

2007 WL 867783 (N.J.Super.Ch.) (Trial Order)  
Superior Court of New Jersey, Chancery Division,  
Chancery Division.  
Middlesex County

In the Matter of Lillian GLASSER, An Incapacitated Person.

No. 209568.  
March 8, 2007.

West Headnotes (1)

[1] **Mental Health** 🔑 **Old Age or Infirmary**

General guardian, rather than a limited guardian, would be appointed for elderly woman in incapacity proceedings; although woman had moments of lucidity, woman suffered from moderate to severe dementia, woman was generally unable to govern herself or manage her affairs, woman was very susceptible to undue influence, woman had profound short-term memory loss and was very easily confused, woman's cognitive abilities were unpredictable and varied from day to day, and her condition would grow progressively worse over time. [N.J.S.A. 3B:1-2](#), 12-24.

[Cases that cite this headnote](#)

### Opinion

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Waugh, J.S.C.

This incapacity matter was before me for trial on thirty-four trial days beginning on July 31, 2006 and ending on October 12, 2006. Following completion of the trial, counsel submitted proposed Findings of Fact and Conclusions of Law, followed by responses to the proposals submitted by adverse parties.

This matter concerns Lillian Glasser (Mrs. Glasser), who was born on XX/XX/1920, in Middlesex County, New Jersey, and lived almost her entire life in New Jersey. She and her late husband, Dr. Benjamin Glasser (Dr. Glasser), lived in Highland Park for approximately 40 years. Mrs. Glasser has two adult children: Mark Glasser (Mr. Glasser), who lives in Miami, Florida, and Suzanne Glasser Mathews (Ms. Mathews), who lives in San Antonio, Texas. Mr. Glasser and Ms. Mathews have taken opposing positions in this litigation, as will be explained in more detail below.

Mrs. Glasser continued to live in Highland Park following her husband's death at the beginning of 2002. Over approximately the last 10 years, Mrs. Glasser, and her husband during his lifetime, leased a residence in Boca Raton, Florida for use primarily during the cold weather. Mrs. Glasser also spent time in San Antonio, Texas, visiting Ms. Mathews and her family. Consequently, Mrs. Glasser divided her time principally between New Jersey and Florida, with considerable time spent visiting her daughter in Texas.

Mrs. Glasser was staying with her daughter in San Antonio in February and March of 2005, while waiting for a live-in companion to be hired so she could return to her winter residence in Boca Raton. On March 14, 2005, Ms. Mathews commenced an incapacity action in Texas. That action was opposed by Mr. Glasser and the court-appointed representatives of Mrs. Glasser in Texas. It was also opposed by Plaintiff Eric Smith (Mr. Smith), the son of Mrs. Glasser's deceased brother Leo Smith. Ms. Mathews was initially appointed as her mother's temporary guardian by the Court in Texas, but was subsequently replaced as temporary guardian by a non-relative through a consent agreement.

In June of 2005, while Mrs. Glasser was still in Texas as a result of the proceedings initiated there, Mr. Smith commenced the present action in New Jersey, seeking to have the issue of Mrs. Glasser's capacity determined in New Jersey - her state of domicile. In September of 2005, Plaintiff Middlesex County Board of Social Services (Board), the adult protective services agency in Middlesex County pursuant to [N.J.S.A. 52:27D-407](#), filed a petition for protective services, taking the position that Mrs. Glasser did not require a guardian but that the question of her capacity should be determined in New Jersey. In November of 2005, the Board filed an amended complaint, seeking the appointment of either a conservator or a guardian, and taking the position that Mrs. Glasser most likely had some degree of incapacity. The Smith and Board Complaints have been consolidated into a single action under the docket number set forth above.

Ms. Mathews ultimately filed a counterclaim in New Jersey, seeking appointment as her mother's guardian and taking the position that Mrs. Glasser is completely incapacitated. Mr. Glasser has also appeared in this action, taking the position that his mother requires only a limited guardianship and that Ms. Mathews should not be appointed as a guardian.

Joan Kern (Ms. Kern), who was an employee of Dr. Glasser when he practiced medicine and maintained a relationship with the family thereafter, was originally a party in this action, seeking to be appointed as guardian for Mrs. Glasser. She relied, in part, on a document naming her as guardian that was signed by Mrs. Glasser on August 3, 2005, after the Texas Court had made a preliminary finding of incapacity. Although she subsequently withdrew as a party, Ms. Kern sought and was granted intervenor status at the commencement of the trial on July 31, 2006.

In a written Opinion dated March 3, 2006, I concluded that, while both Texas and New Jersey had jurisdiction over the issue of Mrs. Glasser's capacity under their respective laws concerning incapacity, the issue of Mrs. Glasser's capacity should be determined in the Courts of New Jersey because of New Jersey's strong public policy that the capacity of its domiciliaries be determined in New Jersey courts. Because I concluded that Mrs. Glasser was clearly a New Jersey domiciliary, I requested the Texas Court either to transfer the Texas action to New Jersey or to stay the Texas action to permit the New Jersey action to proceed. On March 23, 2006, the Honorable Polly Jackson Spencer, the Presiding Judge in Texas, stayed the Texas action. Consequently, the New Jersey action proceeded to the completion of discovery and a lengthy trial.

The detailed circumstances surrounding the commencement of the Texas and New Jersey actions, as well as an outline of the proceedings that took place in both forums, are set forth in considerable detail in my March 3, 2006 Opinion on the issue of jurisdiction, and are incorporated here by reference. They will be repeated below only to the extent necessary to set forth the factual background for a resolution of the issues now before me.

The issue of capacity may not be the subject of a settlement, but must be determined by the Court based upon competent medical or psychological testimony. Some of the parties have taken differing, and at times inconsistent, positions with respect to the extent of Mrs. Glasser's capacity or incapacity. Nevertheless, I note that none of the parties in this action took the position at trial that Mrs. Glasser does not have at least partial incapacity or that she does not need some sort of guardianship to protect her personal and financial interests. As will be explained below, I have concluded that Mrs. Glasser is in need of a general guardian as opposed to a limited guardian, based upon my view of the expert testimony.

All parties have stipulated that, in the event I find Mrs. Glasser to be incapacitated, there should be separate guardians of the person and the estate. They have also agreed that the guardian of the property should be a substantial financial institution to be chosen by the Court.

Ms. Mathews continues to seek appointment as guardian of the person, but has stated her willingness to be a co-guardian of the person with someone else. All other parties oppose Ms. Mathews' appointment as her mother's guardian of the person either alone or with a co-guardian. Ms. Kern also seeks appointment as guardian of the person.

The additional issues to be determined include the following: (1) whether Mrs. Glasser requires a guardian for all purposes or whether there are some issues as to which she should retain decision making capacity; (2) whether the guardian of the person should be Ms. Mathews, Ms. Kern, the Public Guardian for Elderly Adults of New Jersey (Public Guardian) or some other person (with or without a co-guardian); (3) whether the Will and Power of Attorney entered into by Mrs. Glasser in December of 2002 were the product of undue influence or whether Mrs. Glasser lacked the mental capacity to create such instruments; (4) whether Ms. Mathews abused her authority under the Power of Attorney by transferring most of Mrs. Glasser's approximately \$25 Million in assets to a limited family partnership controlled by herself and her husband; and (5) whether other actions taken by Ms. Mathews were in breach of her fiduciary duty to Mrs. Glasser.

Before turning to my specific findings of fact and conclusions of law, it would be helpful to outline the general legal principles involved in this case. With respect to the issue of capacity, *N.J.S.A. 3B:1-2* defines an incapacitated person as “an individual who is impaired by reason of mental illness or mental deficiency to the extent that he lacks sufficient capacity to govern himself and manage his affairs.”

Pursuant to *N.J.S.A. 3B: 12-24. 1a*, the Chancery Division, Probate Part has the authority to appoint a general guardian over the person and estate of an incapacitated person to exercise all rights and powers of the incapacitated. Although an individual may be adjudged to be fully incapacitated and in need of a general guardian, New Jersey recognizes the right of the ward to express her preferences, and the obligation of the guardian to give due regard to those preferences where known and when appropriate.

Under *N.J.S.A. 3B:12-24.1b*, however, if the Court determines that the incapacitated person only lacks the capacity to do some, but not all, of the tasks necessary to care for herself and/or her property, it may appoint a limited guardian. In doing so, the Court must specify “the individual's capacity, including, but not limited to which areas, such as residential, educational, medical, legal, vocational and financial decision making, the incapacitated person retains sufficient capacity to manage” and “may specify the limitations upon the authority of the guardian or alternatively the areas of decision making retained by the person”. *Ibid*.

Under *N.J.S.A. 3B: 12-25*, in a case such as this, one or both of Mrs. Glasser's children would ordinarily be entitled to serve as the guardian or as co-guardians. Mr. Glasser does not seek such an appointment, but opposes the appointment of his sister. Others to be considered, according to the statute, include the Public Guardian, “friends” or, if the Court determines that “no appointment

from among them will be to the best interest of the incapacitated person or the estate, then [] any other proper person as will accept the same". Consideration should also be given to "surrogate decision-makers, if any, chosen by the incapacitated person before the person became incapacitated by way of a durable power of attorney [], health care proxy or advance directive." *Ibid.* See also R. 4:86-6(c), which makes no reference to the Public Guardian or Surrogate decision-makers.

In *In re Queiro*, 374 N.J. Super. 299, 310-11 (App. Div. 2005), the Appellate Division found that the governing statute contains a "kinship-hierarchy preference" in the appointment of a guardian for incapacity matters, relying on its interpretation of the predecessor statute in *In re Roll*, 117 N.J. Super. 122 (App. Div. 1971). In the language quoted from *Roll*, the Appellate Division held that the predecessor statute gave "a preference to the next of kin as against other persons and that such preference must be recognized unless it is shown to the court's satisfaction that the appointment of next-of-kin would be affirmatively contrary to the best interests of the incompetent or his estate in the sense of being deleterious thereto in some significant way." 117 N.J. Super. at 124, quoted in the *Queiro* opinion at 374 N.J. Super. at 310.

With respect to testamentary capacity, Judge Piscal noted in *In re Estate of Frisch*, 250 N.J. Super. 438,447-448 (Law Div. 1991) that the "test for 'testamentary capacity' in New Jersey has a relatively low threshold", and can be stated as follows: "If the testator is capable of recollecting of what his property consists, and who, either in consequence of ties or (sic) blood or friendship, should be objects of his bounty and has a mind sufficiently sound to enable him to know and understand what disposition he wants to make of his property after his death, he is competent to make a valid will." Or, as the Supreme Court said in *In re Livingston's Will*, 5 N.J. 65, 73 (1950), "the gauge of testamentary capacity has been stated to be whether the testator can comprehend the property he is about to dispose of; the natural objects of his bounty; the meaning of the business in which he is engaged; the relation of each of these factors to the others, and the distribution that is made by the will." There is a legal presumption of capacity, and it is the party who challenges that capacity who bears the burden to prove the contrary by clear and convincing evidence. *In re Will & Testament of Liebl*, 260 N.J. Super. 519, 524 (App. Div. 1992), *certif. den.*, 133 N.J. 432 (1993).

Testamentary capacity and undue influence are separate issues, and the latter can be present even when the former exists. *In re Probate of Alleged Will of Landsman*, 319 N.J. Super. 252,268 (App. Div. 1999). In *Haynes v. First Nat'l State Bank*, 87 N.J. 163, 176 (1981), the Supreme Court made it clear that, "(i)f a will is tainted by 'undue influence,' it may be overturned." The Court defined "undue influence" as " 'mental, moral or physical' exertion which has destroyed the 'free agency of a testator' by preventing the testator 'from following the dictates of his own mind and will and accepting instead the domination and influence of another.' " *Ibid.* (Citation omitted).

As the Appellate Division held in *In re Will of Catelli v. Villone*, 361 N.J. Super. 478, 486 (App. Div. 2003), "[w]hen a will benefits one who enjoyed a confidential relationship with the testator, and where there are suspicious circumstances surrounding the will, the law presumes undue influence and the burden is upon the proponent of the will to disprove the presumption." Accord *Haynes v. First Nat'l State Bank*, 87 N.J. at 176. A "confidential relationship" arises "where trust is reposed by reason of the testator's weakness or dependence or where the parties occupied relations in which reliance is naturally inspired or in fact exists". *Ibid.* The "suspicious circumstances" "need be no more than 'slight' ". *Ibid.*

One who acts under a power of attorney for another has a fiduciary obligation to the principal. *D'Amato by McPherson v. D'Amato*, 305 N.J. Super. 109, 115 (App. Div. 1997). The fiduciary must use assets under his or her control for the benefit of the principal. *Ibid.*

At trial, the parties presented essentially two opposing interpretations of the controlling facts. Ms. Mathews maintains that she was genuinely concerned about her mother's capacity and sought to protect her health, her assets and her dignity. Mr. Glasser and Mr. Smith, joined by the Board, contend that Ms. Mathews engaged in a concerted effort (1) to isolate Mrs. Glasser from her other relatives and those upon whom she relied for legal and financial advice and then (2) to take control of her assets for the benefit of the Mathews family and to the detriment of Mr. Glasser. While the happening of many of the significant events that support both interpretations is not disputed, there are vigorous disputes as to the motives of those involved and as to some

of the facts surrounding those events. Consequently, the credibility of the parties and witnesses plays an important role in the resolution of this case.

With respect to the issue of the credibility of the witnesses, my judgments are largely based upon my observation of the testimony on direct and cross-examination, a comparison of the testimony to documentation, the interests of the witnesses in the outcome of the case and the ability of the witnesses to actually know what they were talking about. (*See Model Civil Jury Charges* 1.12 K and L.)

In summary, I found the testimony of Ms. Mathews and her husband to be, at significant times, purposefully forgetful, evasive or simply untruthful, if they believed the actual facts were harmful to Ms. Mathews' position. While Mr. Glasser was, in some ways, more credible, there were times when I felt he was being less than candid with the Court because the true facts were not helpful to his position. As will be explained below, Mr. Glasser's conduct was often counterproductive in relation to his expressed, and I believe sincere, desire to help his mother. I found Mr. Smith to be a very credible witness, as well as one who was basically financially disinterested. I found the health care experts to be credible and their testimony to be helpful, even though they had some differing views as to Mrs. Glasser's condition. I will comment upon the credibility of other witnesses as necessary.

### ***I - Findings of Facts***

At best, the relationship between Mrs. Glasser's two children, Mr. Glasser and Ms. Mathews, was strained and distant, apparently dating from their childhood. Ms. Mathews testified that her brother had been institutionalized in some manner during his teens, which Mr. Glasser denied. While such institutionalization is not particularly relevant, I note that Ms. Kern, whose counsel fees were being paid by Mr. Glasser and whose position was opposed to that of Ms. Mathews, confirmed that Mrs. Glasser once mentioned some sort of institutionalization. In any event, Mr. Glasser himself admitted to attending a number of boarding schools at which he had behavioral problems. I am satisfied that there were undoubtedly significant behavioral problems involving Mr. Glasser's interactions with his parents and with his sister, both before and after he was out of the home for an extended period during his teenage years.

While I have no doubt that mutual love existed between Mr. Glasser and his mother, it was also clear that Mrs. Glasser had some well-founded concerns about her son's behavior and his level of responsibility with money - as an adult. She was also clearly sensitive to the strained relationship between her children. Consequently, she generally sought to treat her children equally financially and to avoid putting one in a position of responsibility for the other's future finances.

While I believe that Mr. Glasser's actions with respect to the proceeding in Texas and in New Jersey were taken largely out of a genuine concern over his mother's health and well being, there was quite clearly also elements of sibling rivalry and financial interest in the mix.

Unfortunately, many of Mr. Glasser's extra-judicial actions with respect to his mother were unhelpful, if not counterproductive, and his tactic of barraging those with whom he disagrees with personal invective - particularly through emails - severely undercut his effectiveness as an advocate for his mother's interest and interfered with the ability of those charged with her care to maintain the services of professional caregivers who were attempting to maintain a stable environment for Mrs. Glasser. Some qualified caregivers apparently quit because of the personal invective. To a significant extent, Mr. Glasser sought to substitute his own judgment for the judgment of various professionals charged with his mother's care without any legal sanction to do so.

Mr. Glasser freely admitted to having a "take no prisoners" position in prior litigation, and unfortunately that attitude appears to have carried over into the present proceedings. His eccentric, and at times bizarre, behavior invited his dismissal as a "crank" whose views should not be credited. That was unfortunate because there was actual merit to some of his concerns about his mother's treatment.

Between January 4, 1996 and October 17, 2002, Mrs. Glasser amended or modified her testamentary plans on five separate occasions as to which there are no allegations of undue influence with respect to the treatment of her two children. In these estate plans, Mr. Glasser and Ms. Mathews were generally to share equally in their mother's residuary estate. Mrs. Glasser did, however, take advantage of statutory provisions that enabled her to leave some funds to her grandchildren with some tax advantage. While as a practical matter that practice benefited only Ms. Mathews' family because Mr. Glasser had no children, there is no reason to believe that Mrs. Glasser would have treated Mr. Glasser's children differently had there been any at the time. However, Mrs. Glasser did leave her son *completely* out of her first 1996 Will, based on her concerns that Mark's frequent trips to Cuba could result in the dissipation of any inheritance left to him. Before the end of 1996, however, Mrs. Glasser executed a new Will treating both of her children in a similar manner.

Mr. Smith was generally treated as a trusted family member selected to serve in various fiduciary capacities and to receive specific bequests. For example, in Mrs. Glasser's Will dated January 4, 1996, which made no provision for Mr. Glasser, Mrs. Glasser expressed her trust in Mr. Smith, as delineated in the 8th paragraph, where she provided that:

“I appoint Benjamin F. Glasser to be the Executor of this Will. If he shall fail to qualify or cease to act, I appoint Eric Smith and Suzanne G. Mathews as Successor Executors in his place and stead. I appoint Eric Smith Trustee of the trust established under Article Fourth and Eric Smith and Summit Bank Co-trustees of any trust created under Article Sixth.

Later in 1996, Mrs. Glasser executed another Will, dated August 1, 1996, providing that Mr. Glasser and Ms. Mathews would share equally in her assets in accordance with its Third and Fifth Articles. Mrs. Glasser again expressed her trust in Mr. Smith by providing in the Eighth Article that:

“I appoint Benjamin F. Glasser to be the Executor of this Will. If he shall fail to qualify or cease to act, I appoint Eric Smith, as Successor Executor in his place and stead. I appoint Eric Smith Trustee of the trust established under Article Third and Eric Smith and Summit Bank Co-Trustees of any trust created under Article Sixth.”

It should be noted that, while Ms. Mathews was named as a back-up co-executor with Mr. Smith in the earlier 1996 Will, in which Mr. Glasser was not a beneficiary, Mrs. Glasser named only Mr. Smith as the back-up executor in the second 1996 Will in which both Mr. Glasser and Ms. Mathews were named as beneficiaries.

On December 12, 1997, Mrs. Glasser modified her estate plan in order to provide for specific bequests to various individuals, including Mr. Smith in the amount of \$25,000.00. Mrs. Glasser further provided that her children would share equally in her estate, and once again reposed her trust in Mr. Smith by providing in Article Seven that:

I appoint Eric Smith Executor of this Will. If he fails to qualify or ceases to act as Executor, then I appoint my children, Suzanne G. Mathews and Mark Glasser as Co-Executors in his place.

By codicil dated June 16, 1998, however, Mrs. Glasser amended her December 12, 1997 Will to provide that Ms. Mathews and Mr. Glasser would serve as “Co-Executors” under her Will.

On June 16, 1998, Mrs. Glasser also executed a Power of Attorney (1998 POA) pursuant to which she appointed Ms. Mathews and Mr. Glasser as her “lawful attorneys-in-fact”, but required that they act *jointly*. In addition, the 1998 POA provided that it would become effective only upon disability and incompetence, as determined by *two* licensed physicians. (This apparently replaced an earlier Power of Attorney that named Ms. Mathews as the attorney-in-fact and Mr. Glasser as the successor attorney-in-fact, although I am not sure that document was admitted in evidence.)

Dr. Glasser died on February 10, 2002. In April of 2002, Michael Lichtenstein, M.D. (Dr. Lichtenstein), who practices in San Antonio, Texas at the University of Texas Health Science Center, was requested by Ms. Mathews to evaluate her mother. Dr. Lichtenstein is board certified in internal medicine and possesses added qualifications in the field of geriatric medicine, in which area he focuses his practice. It appears that he was asked to evaluate Mrs. Glasser, but not to render treatment.

Dr. Lichtenstein evaluated Ms. Glasser on two separate occasions in April of 2002, beginning on April 3, 2005. By report dated April 3, 2002, Dr. Lichtenstein noted that he obtained Mrs. Glasser's history from the patient, whom he described as "forgetful" and from Ms. Mathews, whom he described as "a reliable historian."

In the Instrumental Activities of Daily Living ("IADL") section of Dr. Lichtenstein's April 3rd report, he noted that Mrs. Glasser was dependent on others for household work, yard work, and experienced difficulty shopping; was unable to prepare meals; had difficulty handling her finances; was dependent on others to handle her medications and had difficulty using the telephone.

On April 5, 2002, Dr. Lichtenstein again examined Mrs. Glasser with Ms. Mathews present. In his report detailing the April 5, 2002 visit, Dr. Lichtenstein noted in the interim history section that:

Ms. Glasser returns to continue follow up with her Parkinson's disease and forgetfulness. Prior to today's visit, Suzanne Mathews talked to me about the reliability of her mother's history on the last visit. Ms. Glasser in fact has had problems with driving and is more dependent in her instrumental activities of daily living. (e.g. she never goes shopping on her own - is taken). Ms. Mathews did not want to contradict her mother in front of me on the last visit.

Dr. Lichtenstein also noted in his mental status evaluation that Mrs. Glasser performed poorly on both the Clox I and Clox II drawing tests, both of which are useful in diagnosing cognitive deficits and possible dementia.

Following the evaluations, Dr. Lichtenstein wrote to Ms. Mathews on April 30, 2002, to apprise her of his findings. With respect to Mrs. Glasser's capacity, Dr. Lichtenstein opined:

I evaluated your mother, Lillian Glasser, on April 3rd and 5th, 2002. During those visits, it was clear that her primary problems were related to her Parkinson's disease and history of hypertension. During the second visit, I screened her mental status using the Folstein Mini-Mental Status Exam (MMSE), a clock drawing task (CLOX I and II) and the Geriatric Depression Scale (GDS) Short form. Your mother displayed little evidence of depression and her Folstein MMSE score was close to the cut off dementia (she scored 25/30 with the cut point for dementia being scores of 24 or less). However, on the CLOX tests she showed clear evidence of executive cognitive deficits that did not improve substantially with copying a model (CLOX II). Executive cognitive functions are necessary for organization and planning activities.

Your mother's cognitive deficits are due to her history of hypertension and the Parkinson's disease. Her bereavement may be playing a *minor* role in the testing, but the deficits are real and durable. *They are severe enough at this point that I do not believe Mrs. Glasser has the mental capacity to manage her finances, especially paying bills and making judgments about how to manage her accounts and assets. In the setting of her Parkinson's disease, these deficits are likely to become progressively worse in the years ahead. She still has capacity to make simpler decisions at this time and can still manage small sums of money. However, Mrs. Glasser does not have the capacity to register, retain and rationally manipulate complex details regarding her financial affairs.*

*Under the present circumstances, you should activate the Power of Attorney that your mother executed years ago in anticipation of a time when situations such as her present condition might arise. Your mother wanted you to manage her affairs in her interests if she lost the capacity to manage them herself. Her assets should be used to care for her and maximize her quality of life.*

(Emphasis added).

Dr. Lichtenstein testified that Ms. Mathews had mentioned to him that Mrs. Glasser had a POA at the time of his evaluations in April of 2002. The 1998 POA, which appointed Mr. Glasser and Ms. Mathews as joint attorneys in fact, was the most recent POA that was dated prior to 2002 produced during the trial. Despite Ms. Mathews testimony to the contrary, I find that there was no valid POA naming only Ms. Mathews as attorney-in-fact in existence at the time of Dr. Lichtenstein's examination, but rather that the 1998 POA was still in effect.

Mrs. Glasser was not copied on Dr. Lichtenstein's April 30, 2002 letter to Ms. Mathews, who acknowledged that she never communicated Dr. Lichtenstein's findings and opinion either to her mother or to her brother, the co-attorney-in-fact of the 1998 POA.

Dr. Lichtenstein apparently recommended that Ms. Mathews speak with K.T. Whitehead, Esquire (Ms. Whitehead), who is an attorney in San Antonio. Ms. Mathews subsequently met with Ms. Whitehead, who later represented her with respect to the filing of the temporary guardianship action brought in Texas in 2005.

Ms. Mathews testified that she disagreed with Dr. Lichtenstein's conclusions with respect to her mother's capacity in April of 2002. She asserted that it was her opinion that Mrs. Glasser was primarily suffering from depression resulting from the recent death of her husband. This was in direct contradiction to Dr. Lichtenstein's opinion that Mrs. Glasser's "bereavement may be playing a minor role in the testing, but [that] the deficits are real and durable."

Michael Freedman, M.D. (Dr. Freedman), who practices in New York City at New York University Medical Center and is board certified in internal medicine and geriatrics, began treating Mrs. Glasser in May of 2002. The initial referral to Dr. Freedman was for an evaluation prior to gall bladder surgery that was to be performed in New York. Mrs. Glasser had become ill while in Boca Raton and had returned to her residence in Highland Park for further treatment.

On May 23, 2002, the date of Mrs. Glasser's first visit, Dr. Freedman performed a Folstein Mini-Mental Status Exam (MMSE), which he scored at 23 out of 30, just below the cut-off for dementia. Ms. Mathews did not disclose Dr. Lichtenstein's findings to Dr. Freedman or give him copies of Dr. Lichtenstein's reports. Dr. Freedman concluded that Mrs. Glasser had mild dementia.

At trial, Dr. Freedman testified that he was aware of the recent death of Dr. Glasser at the time of his initial examination, but that he was of the opinion that the MMSE score reflected an underlying dementia as opposed to just depression. Thus, both Dr. Lichtenstein and Dr. Freedman agreed that depression was not the primary cause of Mrs. Glasser's cognitive deficits during the first half of 2002.

Dr. Glasser's Will was admitted to probate in Middlesex County on May 14, 2002. The bulk of his considerable assets were left to Mrs. Glasser. Mr. Smith was to receive a specific bequest of \$25,000, while Mr. Glasser would receive a specific bequest of \$250,000 and Ms. Mathews would receive a specific bequest of \$150,000. Each of Ms. Mathews' three children received a specific bequest of \$40,000.

Had Mrs. Glasser predeceased her husband, one half of Dr. Glasser's residuary estate would have gone to Mr. Glasser or his surviving issue and one half to Ms. Mathews and her surviving issue - with three-quarters going directly to Ms. Mathews and one quarter directly to her children. If any of Dr. Glasser's children had also predeceased him and left no surviving issue, that child's share of the residuary estate would have gone to Dr. Glasser's other remaining issue.

Dr. Glasser had appointed Mr. Smith to three fiduciary positions under the Will that was probated - only one of which went into effect. Had Mrs. Glasser been unable to act as Executor, Mr. Smith would have acted as the Successor Executor. Had there been any residuary beneficiaries under age thirty, Mr. Smith would have acted as Co-Trustee (with Summit Bank) for their inheritance. Mr. Smith's only active role under Dr. Glasser's will was as the Trustee of the Marital Deduction Trust, which was to be funded with approximately \$500,000.

At some point after Dr. Glasser's Will was probated, Ms. Mathews' husband, Gilbert Lang Mathews (Mr. Mathews), investigated Mr. Smith's financial background and accumulated a great deal of information about him and his various business ventures from Dunn & Bradstreet and other financial sources. It appears that Mr. Smith had several business ventures that were either unsuccessful or had financial difficulties, including default judgments and at least one bankruptcy. Mr. Smith himself, however, has never filed for personal bankruptcy. Ms. Mathews then obtained the name of an attorney in New Jersey (Joseph A. Purcell, Esquire, a member of the New Jersey Bar specializing in matters related to trusts and estates), who could be consulted about Mr. Smith's role as the Trustee under her father's Will, and possibly as Successor Trustee.

Ms. Mathews subsequently helped Mrs. Glasser contact Mr. Purcell about whether Mr. Smith could be removed as the Trustee. Although Mr. Purcell testified that Mrs. Glasser was his client and that she articulated her concerns about Mr. Smith, it is clear that Ms. Mathews was actively involved in matters related to the representation. For example, on June 5, 2002, Mary Jean Barnes, Esquire, an associate of Mr. Purcell, directed a letter to the Surrogate of Middlesex County seeking copies of "Letters of Trusteeship" issued on May 14, 2002 with respect to the Estate of Benjamin F. Glasser, which letter stated that the Purcell firm acted as "the attorneys for Suzanne Mathews".

It also appears that some or all of the transactions with respect to Mr. Smith's role under Dr. Glasser's will took place after the gall bladder surgery, as a result of which Mrs. Glasser had experiences post-operative delusions, as discussed below.

After looking into the matter, Mr. Purcell advised Mrs. Glasser and Ms. Mathews that there was no factual or legal basis to remove Mr. Smith as Trustee or Successor Executor under Dr. Glasser's Will. He further advised them that the only way for Mr. Smith's role to be eliminated was for Mrs. Glasser to renounce her interest in the marital deduction trust. At first, Mrs. Glasser was reluctant to do so, because she believed that she would be renouncing the entire residuary estate. When it was further explained that she would only be giving up approximately \$500,000, she agreed to do so.

The appropriate renunciation documents were prepared by Paul Weiss, the law firm handling Dr. Glasser's Estate. On or about June 24, 2002, Mr. Smith received a letter from Paul Weiss enclosing four disclaimer documents, whereby Mrs. Glasser disclaimed her interest in the Trust under Article Fifth of Benjamin Glasser's Will. Mr. Smith executed the disclaimer, which was then filed with the Middlesex County Surrogate.

I do not credit Ms. Mathews' testimony that she and her husband were merely assisting Mrs. Glasser with respect to concerns about Mr. Smith that Mrs. Glasser had raised on her own. Instead, I find that Ms. Mathews, assisted by her husband, made a concerted effort to influence Mrs. Glasser against Mr. Smith so as to eliminate his having any role in Mrs. Glasser's financial affairs.

Ms. Mathews' assertions that Mrs. Glasser did not want Mr. Smith involved in her financial affairs is totally inconsistent with the fact that both Mrs. Glasser and her husband had named him to fiduciary positions under their wills. The Mathews' many assertions that Mr. Smith was attempting to take advantage of Mrs. Glasser for his own personal advantage throughout the relevant period were totally disingenuous and without any basis in fact.

I note that the result of the disclaimer, in addition to the elimination of Mr. Smith's role in Mrs. Glasser's finances, was a distribution of the assets of the Marital Deduction Trust to Ms. Mathews and Mr. Glasser. That was not, however, the goal of the Mathews' actions with respect to Mr. Smith, as evidenced by the fact that the original request was that he be replaced as Trustee.

Ms. Mathews did not disclose Dr. Lichtenstein's finding in April 2002 that Mrs. Glasser did "not have the capacity to register, retain and rationally manipulate complex details regarding her financial affairs" to Mr. Purcell or Mr. Smith at the time they were involved with Mrs. Glasser's renunciation of the Marital Deduction Trust. Nor did she make any disclosure about Dr. Freedman's finding of mild dementia or Mrs. Glasser's post-operative delirium, signs of which, along with signs of dementia, were still observable by Dr. Freedman after the renunciation had been completed.

Dr. Freedman next saw Mrs. Glasser on July 23, 2002, after the gall bladder surgery. He had previously seen her in the hospital following the surgery and discussed with the surgeon the outcome of the operation. He understood that the surgery had gone well, but that Mrs. Glasser had experienced some post-operative delirium.

At trial, Dr. Freedman was of the opinion that the post-operative delirium had largely cleared by the time of the July 23rd examination, but he found Mrs. Glasser to be “more confused and more argumentative”. He concluded that “she did have an underlying dementia and was still showing effects from the surgery”, and that “because of the operation [] the dementia had worsened”. His notes reflect a finding of “mild” to “moderate” dementia.

Although Dr. Freedman was of the opinion that, in general, Mrs. Glasser was capable of making most decisions in 2002, he also testified that, on July 23, 2002, he would not have recommended that Mrs. Glasser make testamentary decisions because she was still recuperating from surgery. When asked whether she needed a guardian at that time, he testified that he did not believe so because he thought her children should help her make decisions, but not take decision-making from her. It was his understanding at the time that Ms. Mathews was actively performing that role.

Ms. Mathews denied that Mr. Purcell ever represented her or her husband. Much has been made of the fact that, on August 16, 2002, Mr. Purcell wrote to Ms. Mathews and enclosed blank forms, said to have been requested by Ms. Mathews, involving powers of attorneys and living wills. There was no testimony that these documents were ever requested by Mrs. Glasser. It appears unlikely that Mrs. Mathews was thinking about having any estate planning done by Mr. Purcell for herself, but more likely than not that she was considering having Mr. Purcell do some estate planning for her mother.

On October 17, 2002, however, Mrs. Glasser executed a Will drafted by the Paul Weiss law firm. There was very little testimony at trial about the circumstances under which that Will was drafted. Nevertheless, it is quite clear that neither Ms. Mathews nor Mr. Glasser participated in the arrangements that led to the drafting and execution of the Will. Indeed, it appears that Mrs. Glasser made those arrangements herself and that neither of her children had the opportunity to influence her with respect to the estate planning embodied in those documents.

Similar to her prior estate plans, Mrs. Glasser's October 2002 Will treated her children equally in terms of their beneficiary status. However, unlike prior estate plans, most of the residuary estate was to be held in trust for the benefit of Mrs. Glasser's two children, and then for the benefit of her grandchildren. Both Ms. Mathews and Mr. Glasser would receive one equal share of the residuary estate, with one third of such share going outright to each and two thirds going into separate trusts for their benefit. Thus, if the residuary estate were to be valued at \$24 Million, Ms. Mathews and Mr. Glasser would each receive \$4 million outright with \$8 million in trust. The remainder of each Trust was to go to the beneficiary's issue, failing which it would go to any surviving issue of Mrs. Glasser. The Will specifically stated that adopted children could take under the Will, but that illegitimate children could not.

Although Mr. Smith was to receive a \$50,000.00 bequest, there was no role for him as a fiduciary under the October 2002 Will. Mrs. Glasser provided instead that her financial advisor, Neuberger Berman Trust Company, N.A. (Neuberger Berman), would serve as her Executor and Trustee under the Will. The Will provided that Paul Weiss would serve as counsel to the Estate. A power of attorney was also signed by Mrs. Glasser, naming her accountant, Michael Hecht (Mr. Hecht), as her attorney-in-fact.

Mrs. Glasser was seen by Dr. Freedman shortly before she executed the October 17, 2002 Will. His notes reflect that she was “argumentative”, “angry” (apparently with Ms. Mathews) and had “word-finding problems”. Despite whatever “anger” there was with respect to Ms. Mathews, both children were treated equally by Mrs. Glasser in the October 2002 Will as noted above. In addition, she named Ms. Mathews as her Health Care Representative in a New Jersey Proxy Directive prepared by Paul Weiss and signed by her on October 17, 2002.

On November 25, 2002, Mrs. Glasser had hip-replacement surgery. Following the surgery, Mrs. Glasser again suffered from post-operative delirium. Dr. Freedman was concerned that some of the effects of the post-operative delirium lasted into January of 2003, when he next saw her, although he said she was much improved by then. He testified at trial that he would not have recommended that she execute a power of attorney or will on the day he saw her, which was January 9, 2003. In fact, as will be discussed next, she had executed such documents shortly after her release from the hospital - much closer to the episode of post-operative delusions.

Mrs. Glasser was discharged from the hospital on December 4, 2002. Ms. Mathews telephoned Mr. Purcell on Friday, December 6, 2002 and put Mrs. Glasser on the line to seek advice on estate planning. Mr. Purcell understood that Mrs. Glasser had made a Will in October that she now wanted to change. Mr. Purcell went to Mrs. Glasser's home in Highland Park, New Jersey on Saturday, December 7th, to discuss new estate planning documents.

Although Ms. Mathews was present in the house, she did not participate in Mr. Purcell's discussion with Mrs. Glasser concerning the new Will and POA. Nevertheless, as will be discussed more fully later in this Opinion, I am convinced that Ms. Mathews used undue influence to cause her mother to make material changes in her estate plan to the benefit of Ms. Mathews and at the expense of Mr. Glasser at a time when Mrs. Glasser was particularly vulnerable because of the underlying cognitive deficits and the aftereffects of the recent surgery.

Mr. Purcell testified that Mrs. Glasser told him that she had felt pressured by Paul Weiss to name the firm as attorney for the estate and to designate someone named Hecht as Executor. Although the October 2002 Will does call for Paul Weiss to be the attorneys for the estate, it does not name Mr. Hecht as the Executor. Hecht and Company was to be the accountant for the Estate. Neuberger Berman was to be the Executor and Trustee.

Mr. Purcell testified that Mrs. Glasser wanted her assets divided equally between her two children, but that she did not want Mr. Glasser to have total control over his share of the assets. She expressed concern that Mr. Glasser would dissipate his share of the assets, and mentioned her concerns about Cuba. Consequently, she wanted an independent Trustee for his Trust. These concerns were consistent with those Mrs. Glasser had expressed in the past. Mr. Purcell said that Mrs. Glasser did not share the same concerns with respect to Ms. Mathews and made Ms. Mathews, rather than an independent Trustee, the Trustee for her own Trust.

Mr. Purcell testified that Mrs. Glasser wanted her assets to benefit her Mathews grandchildren following the death of both of her children. To this end, the remainder of Mr. Glasser's Trust was to go to Ms. Mathews or her children, even if he died leaving issue. This was a striking departure from prior testamentary plans, other than the brief period during which Mr. Glasser (and implicitly his issue) was completely disinherited. According to Mr. Purcell, when he asked Mrs. Glasser why she did not want to benefit any children of Mr. Glasser, she responded to the effect that he would not really know any children he might have in the future. I am convinced that that sentiment originated with Ms. Mathews rather than with Mrs. Glasser, who had just included Mr. Glasser's issue in the October Will.

Mrs. Glasser also requested a new POA. She wanted a "springing" POA, because she did not want anyone else controlling her assets as long as she had the capacity to manage her own affairs. She asked that Ms. Mathews alone be named the attorney-in-fact.

Mr. Purcell drafted over the weekend and on the following Monday, December 9, 2002. Ms. Mathews and Mrs. Glasser went to his office that afternoon. With Ms. Mathews in the waiting area, Mr. Purcell went over the proposed Will and POA with Mrs. Glasser. Mrs. Glasser executed the new Will and POA, as well as a new health care power of attorney naming Ms. Mathews.

Although Mr. Purcell understood that Mrs. Glasser was not leaving for Boca Raton immediately, he did understand that there was some unexplained urgency in executing the new Will. In fact, Mrs. Glasser did not travel to Boca Raton until the end

of December 2002 or early January 2003. The urgency, which has not been satisfactorily explained, clearly had the effect of completing the revised estate plan within five days after Mrs. Glasser's release from the hospital.

Mr. Purcell testified that he believed that Mrs. Glasser was not incapacitated or the subject of undue influence at the time she signed the new Will and POA. He believed that she knew the natural objects of her bounty and the extent of her assets. As discussed below, Mr. Purcell viewed Mrs. Glasser as someone with a "very simple mind". However, Ms. Mathews had not disclosed to Mr. Purcell that Dr. Lichtenstein had advised implementing an earlier power of attorney because of Mrs. Glasser's cognitive deficits, that Dr. Freedman had diagnosed dementia or that Mrs. Glasser had just been released from the hospital following surgery that had resulted in post-operative delusions.

There are some significant differences between the October 2002 Will and the December 2002 Will, most of which benefit Ms. Mathews and her family. First, in contrast to the October Will, the December Will named Ms. Mathews as opposed to an independent entity as the Trustee for her own Trust, which gave her the authority to distribute to herself some or all of the principal. Second, the December Will disinherits any future children of Mark Glasser. While the October Will would have permitted a child born to him in marriage or adopted by him (without regard to marriage) to inherit the remainder of his Trust, under the December Will the assets remaining in his Trust at his death are to be paid to Ms. Mathews or her surviving issue, even if Mr. Glasser died leaving issue of his own. Third, Ms. Mathews is named as the Executor and, for the first time in any of Mrs. Glasser's wills, Mr. Mathews is named as the back-up Executor.

Fourth, although the October Will contained eleven individual bequests totaling \$270,000 and five charitable bequests totaling \$400,000, the December Will contains five individual bequests totaling \$190,000 and two charitable bequests totaling \$100,000. Consequently, the \$670,000 in bequests were reduced by \$380,000 between October and December of 2002. One of the charitable bequests that was completely eliminated in the December Will was a \$200,000 bequest to the Rutgers University Foundation to fund an annual memorial scholarship in the name of Dr. and Mrs. Glasser.

In December 2002, Mrs. Glasser also signed letters, drafted by Mr. Purcell, discharging Mr. Hecht, her prior accountant, and Paul Weiss, her prior estate planning attorneys, from involvement in her financial affairs, and revoking the October POA, which named Mr. Hecht as the attorney-in-fact. In late 2002, Mrs. Glasser's investment assets were transferred from Neuberger Berman, her prior investment adviser, to Goldman Sachs. I find that Ms. Mathews had advocated the move to Goldman Sachs.

Thus, in December of 2002, when Ms. Mathews was involved in the process, Mrs. Glasser's estate plan was significantly changed from the October 2002 estate plan prepared when Ms. Mathews was not involved. The changes clearly benefited Ms. Mathews and her family. In addition, there was a complete change in Mrs. Glasser's financial, legal and accounting advisors from those chosen by Ms. Mathews in the past to those chosen by or with the assistance of Ms. Mathews.

In 2003, at various meetings with representatives of Goldman Sachs, the possibility of having Mrs. Glasser create a Family Limited Partnership (FLP) was apparently raised by her financial advisors at that firm. An FLP is a limited partnership into which one or more family members transfer assets in exchange for an ownership interest in the limited partnership, which can then be gifted or bequeathed to other family members. *If done correctly*, the FLP can be a device for (1) lowering estate and gift taxes and (2) protecting assets.

The theory for the tax savings is that the value of the illiquid interest in the limited partnership is smaller than the value of the liquid assets held by the FLP, while the theory for the asset protection is that the most a creditor can get is a pay out order for payment out of distributions from the limited partnership, if any are actually made for the benefit of the judgment debtor. See "Comment: 'Adequate and Full' Uncertainty: Courts' Application of Section 2036(a)(1) of the Internal Revenue Code to Family Limited Partnerships", 84 N.C.L. Rev. 694 (2006) and *Strangi v. Comm'r*, 417 F.3d 468 (5th Cir. 2005).

As will be seen, both Ms. Mathews and her husband were very involved in the discussions of the FLP and the implementation of the proposal. In September of 2003, with Mr. Mathews' assistance, a meeting was arranged with S. Stacy Eastland, Esquire (Mr.

Eastland), a Texas attorney who was a managing director at Goldman Sachs in Houston and an advocate of the use of FLPs for estate planning purposes. Mr. Mathews testified that he and Mr. Eastland had discussed the FLP concept prior to the meeting. According to the Mathews, they did not attend the substantive discussions held between Mr. Eastland and Mrs. Glasser.

Following the September meeting, Ms. Mathews telephoned Mr. Purcell and told him about the proposed FLP, which, according to Mr. Purcell, Ms. Mathews described as a “wonderful tax saving device”. Mr. Purcell met with Ms. Mathews and Mrs. Glasser at Mrs. Glasser's home in Highland Park and also attended a meeting with Mrs. Glasser, Ms. Mathews and others at Goldman Sachs in New York City to discuss the idea of forming an FLP for Mrs. Glasser.

Mr. Purcell advised Mrs. Glasser generally about how FLPs worked and gave a general outline of how one would be structured. He recommended it to Mrs. Glasser as a vehicle for estate tax reduction, in which he said Mrs. Glasser was “quite interested”. He testified at trial that Ms. Mathews was “very much in favor” of the FLP. Mr. Purcell then commenced drafting a FLP to be formed in New Jersey (NJ FLP) for Mrs. Glasser.

Mr. Mathews was very involved in the drafting process. He received and commented upon at least one draft of the document. He communicated with Mr. Purcell's office to request information about the NJ FLP, the related transactions and to make suggestions. Mr. Mathews was also involved in obtaining Mrs. Glasser's financial information from Goldman Sachs for use by Mr. Purcell, although it is not clear what authorization he had from Mrs. Glasser to do so. None of Mr. Mathews' communications with Mr. Purcell, his staff or Mr. Eastland were communicated to Mrs. Glasser.

During a telephone conversation with one of Mr. Purcell's associates on December 11, 2003, Mr. Mathews expressed concern, which he claimed Mr. Eastland shared, about Mr. Purcell's proposal that the general partners of the NJ FLP be Mrs. Glasser and a corporation. Instead, he suggested that Suzanne Mathews be the other general partner. This conversation was memorialized in an interoffice memorandum to Mr. Purcell of the same date.

The fifty-four page document prepared by Mr. Purcell created a New Jersey Limited Partnership to be known as LGF Ventures, L.P. The two general partners were Mrs. Glasser and a corporation known as LGF Ventures Corporation, which was specifically created for that purpose. In the event Mrs. Glasser were to die or become incapacitated, she would be succeeded as a General Partner by Ms. Mathews. Mr. Mathews was named as the next successor general partner. The limited partners were Mrs. Glasser and Ms. Mathews.

There was some urgency in completing the NJ FLP so that Mrs. Glasser could sign it before she left New Jersey for Boca Raton, as referenced in the Purcell firm's interoffice memorandum. Mrs. Glasser signed the partnership document on December 11, 2003. Ms. Mathews signed those portions requiring her signature as a limited partner on December 23, 2003. However, the partnership agreement would not actually come into effect until the partnership was funded - which never happened. In addition, the overall plan required the drafting of additional documents, discussed below, which also never took place.

The NJ FLP was one of several documents required to implement the overall estate plan, all of which were summarized in a letter from Mr. Purcell to Mrs. Glasser. There are two versions of this letter, one dated December 2, 2003 and the other dated December 19, 2003. Although they are similar, they are not identical and it appears that the earlier version sets forth some structuring options for the NJ FLP that were subsequently changed during the drafting process. This was the type of letter that Mr. Purcell normally sent to a client before the estate-planning documents were signed.

Although the version dated December 2, 2003 is signed by Mr. Purcell, it was never sent to Mrs. Glasser. More significantly, the unsigned December 19, 2003 version was sent to Ms. Mathews with a cover letter stating that Mr. Purcell intended to send the letter to Mrs. Glasser in Florida. But, it too was never actually sent to Mrs. Glasser.

Mr. Purcell testified at trial that he wanted Ms. Mathews to advise him as to whether Mrs. Glasser would understand the “very, very complicated” letter and its content, or whether it would upset her because she had “a very simple mind”. Even though he

(1) had initially represented Mrs. Glasser in connection with the renunciation of the Marital Deduction Trust from Dr. Glasser's Will in July of 2002 and then (2) represented her in the preparation of her own Will and Power of Attorney in December of 2002 and was now (3) engaged in further estate planning including the creation of an FLP which Mrs. Glasser had already signed, Mr. Purcell was "concerned that sending a letter like [the December 19th letter] from a perfect stranger, which I was here essentially to Lillian Glasser, without giving her daughter the opportunity to say, yes, my mother should get this, or, no, my mother should not" would not be "right".

Despite the contrary testimony of the Mathews at trial, they were clearly very involved and interested in the FLP and its drafting. I found particularly disingenuous Ms. Mathews' assertions that she did not understand why Mr. Purcell was sending her documents, such as the December 19th letter to Mrs. Glasser, and addressing her as "Suzanne". She was clearly attempting to lead the Court to believe that she was only slightly involved in a process in which she and her husband were actually very involved.

Although he did not ordinarily do so, Mr. Purcell had undertaken to act as the registered agent of LGF Ventures Corporation, the other general partner of the NJ FLP, because he was concerned that Mrs. Glasser "was not somebody who should be handling [] complicated financial affairs." He was also concerned that, if she received a significant volume of tax and other documents related to the NJ FLP, she "might throw it away in the wastebasket." These statements demonstrate Mr. Purcell's understanding that Mrs. Glasser did not then have the ability to comprehend complicated financial arrangements at that time.

At trial, Mr. Purcell persisted in his testimony that he was not concerned about Mrs. Glasser's "ability" or her "capacity", but that he was just concerned about Mrs. Glasser because she was "elderly" and had "a very simple mind". The fact is that Ms. Mathews never told Mr. Purcell about the dementia diagnosis by Dr. Freeman or Dr. Lichtenstein's concern that Mrs. Glasser lacked "the mental capacity to manage her finances, especially paying bills and making judgments about how to manage her accounts and assets." In addition, Mr. Purcell was not aware that the first two times he interacted with Mrs. Glasser, she had recently had surgeries resulting in post-operative delirium. On each occasion, Mr. Purcell apparently saw what he expected to see - and what Ms. Mathews wanted him to see - a nice, but simple old lady relying extensively on her daughter, and latterly son-in-law, for assistance with her financial planning.

In January of 2004, both Mrs. Glasser and Mr. Smith, her nephew, were in Florida. She telephoned Mr. Smith and inquired whether he was familiar with family limited partnerships in New Jersey. They subsequently met at Mrs. Glasser's apartment in Boca Raton on January 11, 2004. At that time, she gave him an unsigned and incomplete version of an FLP to review. Because David Lawrence (Mr. Lawrence), a relative of Mrs. Glasser's who worked for Goldman Sachs, was mentioned in the draft agreement, Mr. Smith recommended that Mrs. Glasser contact him. She attempted to do so at that time, but was unsuccessful. Mr. Smith then recommended that she consult with independent counsel to discuss the intricacies of the document, as was suggested by the language of the draft agreement itself.

Mr. Smith was not aware at the time that Mr. Purcell considered himself to be Mrs. Glasser's attorney with respect to the transaction. I find credible Mr. Smith's testimony that Mrs. Glasser was concerned that Ms. Mathews would be "mad" if she consulted a lawyer, but that he urged her to do so anyway.

Mr. Smith was also not aware that Mrs. Glasser had already executed a later version of the document. It is not at all clear from the record whether Mrs. Glasser had actually received a copy of the signed document or whether, if she had, she brought the copy with her to Florida. I also cannot determine from the record whether Mrs. Glasser forgot that she had signed the NJ FLP, was not sure what she had signed or did not want to tell Mr. Smith that she had already signed it. I do, however, find credible Mr. Smith's assertion that Mrs. Glasser was seeking his advice about the NJ FLP.

Mr. Smith recommended that Mrs. Glasser consult with two attorneys, one in New Jersey and one in Florida. He recommended Barnet E. Hoffman, Esquire (Mr. Hoffman), an attorney and retired judge whom both he and Mrs. Glasser knew from living in

Highland Park and with whom he served on a charitable board. Mr. Smith also recommended a Florida attorney named Ronald Kochman, Esquire (Mr. Kochman), who had apparently represented a relative of Mrs. Glasser in some business transactions.

Mrs. Glasser requested Mr. Smith to contact both attorneys on her behalf. He suggested that she authorize him to do so through a Power of Attorney, which he wrote out and she executed on January 11, 2004. It authorizes him to “engage” Mr. Hoffman and Mr. Kochman to “represent [her] in various matters as necessary”. Mr. Smith then faxed the relevant documents, with some comments of his own, to Mr. Hoffman and Mr. Kochman.

I am more than satisfied that Mr. Smith was not an “officious intermeddler” attempting to intrude himself into Mrs. Glasser's financial affairs, but rather that he was questioned by Mrs. Glasser about the agreement and acted in good faith to assist her. It is also crystal clear that Mr. Smith was attempting to assist Mrs. Glasser out of a genuine concern for her well being, rather than in the hope that he would benefit financially or otherwise. Ms. Mathews' suggestions to the contrary are simply disingenuous.

On January 13, 2004, Mr. Smith faxed Mrs. Glasser a handwritten note setting forth some questions that he suggested she ask Mr. Purcell in the event he should call her. Throughout the entire drafting process, however, Mr. Purcell had never telephoned Mrs. Glasser about the NJ FLP, because, he testified at trial, it “wouldn't have made any sense to her” and “[s]he wouldn't have known what I was talking about.”

Mr. Smith suggested that, if Mr. Purcell called, Mrs. Glasser should request “a letter from [him] summarizing and explaining the Partnership Agreement and how it works”, as well as questions about the benefits and costs of the arrangement. Ironically, in my view, the questions outlined by Mr. Smith were the very types of questions the letter drafted by Mr. Purcell, but never sent to Mrs. Glasser, were intended to address.

Mr. Hoffman had the draft FLP reviewed by one of his partners, Jeffrey M. Hyman, Esquire (Mr. Hyman), who specializes in estate planning and was described by Mr. Purcell at trial as “a very preeminent attorney in New Jersey”. On January 16, 2004, Mr. Hoffman sent a letter, apparently drafted by Mr. Hyman, to Mrs. Glasser which included the following advice:

\* \* \* In reviewing the Agreement, it is clear that *no* documents should be signed at this time. More specifically, *this* Limited Partnership Agreement should not be signed at this time. The document is *not complete*, is *not precise* and has provisions which could be very *detrimental to you*. That is not to say that the concept should not be explored. However, the terms of *this* document do not protect you or your family's interest (Suzanne and Mark). Any document such as this should be carefully reviewed in conjunction with your overall financial planning. You should be provided with a clear written summary explanation of all the benefits, dangers and tax ramifications before you sign a document.

(Emphasis in original). Mr. Hoffman suggested that Mrs. Glasser consult with either or both of Mr. Kochman or his partner Mr. Hyman.

While visiting Mrs. Glasser in Florida, Ms. Mathews apparently learned about her interactions with Mr. Smith. I do not credit Ms. Mathews' testimony that her mother was upset by Mr. Smith's involvement, although she may well have been upset by Ms. Mathews' reaction. As noted above, Mrs. Glasser told Mr. Smith that Ms. Mathews would be “mad” at her if she sought outside legal advice. Mr. Smith received a very angry telephone call from Ms. Mathews telling him never to discuss those issues with Mrs. Glasser again.

At his wife's request, Mr. Mathews went to Boca Raton. A document revoking the Smith Power of Attorney was prepared, probably by Mr. Mathews, and then signed by Mrs. Glasser. It is dated January 30, 2004. The following day, Mr. Mathews hand delivered the document to Mr. Smith in the presence of his father Leo Smith, who was Lillian Glasser's brother.

On or about February 6, 2004, Mr. Smith faxed a letter to Mr. Purcell to explain the actions he had taken. He specifically pointed out the provision in the draft agreement, which is also contained in the final NJ FLP document signed by Mrs. Glasser, reflecting that each of the partners of the limited partnership was advised by the attorney who prepared it to seek independent legal advice. Mr. Smith subsequently attempted to telephone Mr. Purcell, who refused to take any of his telephone calls.

Mr. Purcell prepared a Power of Attorney from Mrs. Glasser to Mr. Lawrence, which authorized him, among other things, to discuss the financial issues with Mr. Smith and his father. Mr. Mathews was involved in the drafting of that document, which would also have authorized Mr. Lawrence to commence suit against the Smiths if they did not “back-off”, as Mr. Mathews phrased it in a February 11, 2004 letter to Mr. Purcell. Mr. Purcell had only a “dim” recollection of having discussed the document with Mrs. Glasser. A copy of the POA to Mr. Lawrence was sent by Mr. Purcell to Mr. Smith.

As was generally the case with respect to the NJ FLP documents, Mrs. Glasser was not copied on the correspondence sent out by Mr. Mathews or Mr. Purcell. It is also clear that Mr. Purcell was taking most of his direction from the Mathews, rather than directly from Mrs. Glasser.

Mr. Smith and Mr. Lawrence subsequently had a lengthy telephone conversation in which Mr. Smith explained his reasons for becoming involved and his concerns to Mr. Lawrence. Mr. Smith testified at trial that he believed that Mr. Lawrence would look after his aunt's best interests and, consequently, had no further involvement in the issue of the NJ FLP.

Mrs. Glasser never funded the NJ FLP or pursued the creation of the related estate planning documents. Ms. Mathews' explanation, that her mother wanted to make one or more substantial charitable contributions in memory of Dr. Glasser and never decided how to do so, was far from convincing. Mr. Purcell had no recollection of such an issue being discussed at the time the documents were being discussed. I am satisfied that Mrs. Glasser did not fund the NJ FLP because she did not want to do so, and not because she was having trouble deciding what charitable donations to make to honor her late husband. The NJ FLP was not her idea in the first place, and she clearly had questions about it at the time she asked for Mr. Smith's advice.

According to her testimony, Ms. Mathews became more concerned about her mother's medical condition as 2004 progressed toward the summer. She believed that her mother was becoming tired more easily, and that she was having problems paying her bills. She testified that, by September of 2004, her mother was no longer paying her bills at all.

Ms. Mathews took Mrs. Glasser to see Dr. Lichtenstein on September 22, 2004 for a “re-evaluation”. Dr. Lichtenstein's notes reflect that much of the discussion of Mrs. Glasser's mental capacity took place out of her hearing. Ms. Mathews told Dr. Lichtenstein that she had a Medical Power of Attorney and that a cousin in New York, presumably Mr. Lawrence, had a Financial Power of Attorney. (She apparently did not tell him that she also had a Financial Power of Attorney.) It also appears that she told Dr. Lichtenstein that other family members in New Jersey, presumably Mr. Smith, were seeking Powers of Attorney. Ms. Mathews inquired whether a guardianship was necessary.

Dr. Lichtenstein examined Mrs. Glasser and concluded that she had no insights into her cognitive deficits. He also found that her “cognitive deficits in 2002 [had] progressed to the point where she meets clinical criteria for being demented.” Her MMSE was 21/30 on that date, below the cut off for dementia.

Following the examination, Dr. Lichtenstein advised Ms. Mathews about future actions over the telephone, without Mrs. Glasser's participation. He advised that the “Powers of Attorney” should be “fully activated”. However, Ms. Mathews did not activate the 2002 POA in September of 2004, although it would have permitted her to do so solely on the basis of Dr. Lichtenstein's findings.

Dr. Lichtenstein also noted that Mrs. Glasser's “diminished mental capacity places her at risk of people taking advantage of her”, and advised that steps be taken to prevent any such occurrence. If such steps were unsuccessful, he thought a guardianship

might be necessary, noting in his report that Ms. Mathews had already been in touch with Ms. Whitehead. Dr. Lichtenstein sent Ms. Mathews a copy of his report of the September 22nd examination.

On September 23, 2004, Mr. Mathews' secretary faxed the Lichtenstein report to Mr. Lawrence at Goldman Sachs. The following day, Mr. Mathews wrote to Mr. Lawrence and outlined a number of "troubling occurrences" concerning Mrs. Glasser. His letter reflects a copy going to his "Lillian Glasser File". It was not clear at trial why the report was sent to Mr. Lawrence, but Ms. Mathews' explanation at trial, that she simply wanted him to know how her mother was doing, was not at all convincing. It is more likely than not that Ms. Mathews was, at that time, considering implementing her 2002 POA and using it to transfer her mother's assets into an FLP. In this general time frame, she was again consulting with Mr. Eastland of Goldman Sachs, who was the original proponent of the family limited partnership concept.

Dr. Freedman's notes reflect that he learned on October 1, 2004 that Mrs. Glasser required hernia surgery. His entry for October 22, 2004 states that the surgery had taken place during the prior week and that Mrs. Glasser experienced post-surgical paranoia, for which she was taking Seroquel, and that she was "aggressive". The entry also reflects that her pre-surgical MMSE score was "20", which is probably a slightly inaccurate reference to Dr. Lichtenstein's finding of 21/30 on September 22nd. I have no doubt that Ms. Mathews was the source of this information.

Dr. Freedman actually saw Mrs. Glasser on October 24, 2004, at which time she was having a problem with the surgical wound. His notes reflect that a nurse, who had accompanied Mrs. Glasser from San Antonio to New Jersey, indicated that she was still paranoid. Dr. Freedman noted increased dementia. Mrs. Glasser was taking 25mg of Seroquel.

On October 28, 2004, Ms. Mathews caused a copy of Dr. Lichtenstein's September 22, 2004 report to be faxed to Dr. Freedman in New York. Dr. Freedman saw Mrs. Glasser again on November 2, 2004. He recorded an MMSE score of 27/30, which is above the dementia cut off, but also that Mrs. Glasser was unable to draw a clock, which is indicative of dementia. His notes indicate that Mrs. Glasser was not to drive, but it is unclear whether he told that directly to Mrs. Glasser or only to Ms. Mathews. The entry is immediately below a note about a discussion "with family".

On November 5, 2004, Ms. Mathews sent a letter to Jonathan Torop (Mr. Torop), a Vice President at Goldman Sachs, forwarding a copy of her POA and asking that Goldman Sachs "confirm that it will act in accordance with [her] instructions" regarding her mother's account. On the same day, copies of Dr. Lichtenstein's most recent report and his 2002 reports were also sent to Leonard M. Goldberg, Esquire (Mr. Goldberg), a trust and estates attorney in New Jersey.

Ms. Mathews testified that Mr. Goldberg was recommended by Mr. Eastland. Ms. Mathews testified that she was put in touch with Mr. Goldberg "to protect [her] mother's assets for [her] mother". During her testimony, "protecting assets" was how Ms. Mathews repeatedly articulated the reason for the FLP she created in 2004.

Ms. Mathews was apparently looking for a New Jersey attorney other than Mr. Purcell, who had drafted the early FLP and who knew her mother, but who did not know about the diagnoses concerning Mrs. Glasser's cognitive abilities going back to April 2002, i.e., even before his first representation of her. Ultimately, Ms. Mathews used an attorney in Texas to create a new FLP in Texas.

Dr. Freedman saw Mrs. Glasser again on November 9, 2004. The problem with the surgical wound had been resolved. She was still on 25mg of Seroquel. His notes reflect a diagnosis of moderate dementia. Dr. Freedman's notes for November 11, 2004 reflect a telephone call from Ms. Mathews to the effect that Mrs. Glasser was driving and not taking her medications reliably. Dr. Freedman apparently reiterated that Mrs. Glasser should not be driving and, according to his notes, "suggested a conservatorship". On November 12, 2004, Dr. Freedman wrote to Ms. Mathews and [suggest[ed] that [she] invoke [her] power of attorney to handle [Mrs. Glasser's] financial matters, as she is not capable of handling her own affairs."

On December 3, 2004, Ms. Mathews faxed a copy of Dr. Freedman's November 12th letter to Mr. Torop "[a]s requested". It is not clear whether "[a]s requested" indicates that Goldman Sachs wanted a second opinion before agreeing to honor the POA. However, Ms. Mathews took the position at trial that she had sent the POA to Goldman Sachs in November "for them to be checking it out", which is not consistent with the request in her November 5th letter that Goldman Sachs "confirm that it will act in accordance with [her] instructions" regarding her mother's account.

On December 3, 2004, Ms. Mathews caused a copy of her POA to be faxed to Broadway National Bank in San Antonio. She subsequently opened an account there as her mother's attorney-in-fact. The account was opened on December 14, 2004 with a minimal deposit. \$60,000 was deposited into the account on December 20, 2004.

On December 28, 2004, Ms. Mathews used her authority under the POA to create an FLP in Texas (Texas FLP), known as LSG Investments, LP. The general partner of the Texas FLP was a Texas corporation, created for the purpose by Ms. Mathews, known as LSG Operations, LLC (Operations). Operations was owned and controlled by Ms. Mathews (89.43%) and Mr. Mathews (10.57%). Mrs. Glasser had no interest in Operations, although, as the general partner of the Texas FLP, Operations was soon to control virtually all of Mrs. Glasser's assets. The limited partner of the Texas FLP was Mrs. Glasser, although she had no personal involvement in its creation or funding - all of which was done by Ms. Mathews under the POA without Mrs. Glasser's knowledge.

The Mathews contributed \$242,000 to the Texas FLP. Using the POA, Ms. Mathews transferred approximately \$24 Million of her mother's assets to the Texas FLP, according to Schedule A of the Texas FLP partnership agreement. Funds were transferred on or about January 5, 2005 from a Vanguard Group account, as requested in Mr. Mathews in a January 5, 2005 letter. On January 19, 2005, the funds in the Goldman Sachs account were transferred to the Texas FLP. On March 11, 2005, Ms. Mathews used the POA to transfer Mrs. Glasser's personal residence in New Jersey to the Texas FLP.

Ms. Mathews testified that the Texas FLP was intended to protect her mother's assets, rather than to act as an estate tax reduction device. I did not find her explanations convincing, inasmuch as it was clear from the testimony concerning the proposed NJ FLP that the FLP was viewed as a tax savings device and the explanation of the need to protect assets was extremely weak. There is, of course, nothing to prevent someone from seeking to avoid estate taxes in any lawful manner. Whether an FLP falls into that category appears to be something of an issue.

According to Ms. Mathews' testimony, she was concerned that Mrs. Glasser might be found liable for personal injuries related to her driving or her real property holdings, with the resulting judgments depleting her assets. Mrs. Glasser had previously been sued with respect to a personal injury incident arising out of an investment property as to which there was apparently no liability insurance, which was cited as an example of the need for asset protection. There was no real explanation of why Ms. Mathews could not have resolved any such concerns by obtaining sufficient liability and umbrella insurance for her mother's protection.

Even more incredible, in my view, was Ms. Mathews' explanation of the Texas FLP as a solution to the problem of her mother's potential liability for driving accidents. It was apparent from Ms. Mathews' testimony that, despite the fact that Dr. Lichtenstein had twice told her that her mother should not drive, she was continuing to allow her mother to do so in December of 2004 and perhaps January of 2005. Ms. Mathews testified, *in essence* although not in those words, that it was easier to put her mother's assets in an FLP to protect them in case her mother injured someone than it was to prevent her from driving so that nobody would be injured in the first place.

Perhaps most importantly, the Texas FLP was clearly a vehicle to assure Ms. Mathews near absolute control over Mrs. Glasser's assets even after her death. Under the December 2002 Will, Mr. Glasser's share of Mrs. Glasser's residuary estate, which would consist primarily of her limited-partnership interest in the Texas FLP, would go into a Trust. However, because the limited-partnership interest would be extremely illiquid and because any income or principal from the investments held by the Texas FLP would only be distributed with Ms. Mathews' consent or as required by the IRS, Ms. Mathews would potentially have considerable control over her brother's access to the income and principal from his Trust.

In her trial testimony, apparently in an effort to counter the suggestion that she had been attempting to disadvantage her brother by establishing the Texas FLP, Ms. Mathews appeared to suggest that either the Texas FLP would dissolve automatically at Mrs. Glasser's death or that she would use her authority as the general partner to dissolve it, so that her mother's testamentary wishes could be followed and her brother's Trust would be funded with the disbursed assets of the Texas FLP. I did not find this testimony to be believable.

Ms. Mathews' testimony in this regard was particularly disingenuous given the provisions of the Texas FLP agreement signed by Ms. Mathews. There is no specific provision for dissolution of the partnership upon the death of the sole limited partner (Mrs. Glasser) and no language whatsoever to suggest that it was intended to exist only during Mrs. Glasser's lifetime.

In fact, the term of the partnership, under Section 2.4, was to be 40 years, far beyond Mrs. Glasser's life expectancy. I note that, in connection with the drafting of the NJ FLP, Mr. Mathews had taken the position in an email to Mr. Eastland that the duration of that partnership should be longer than the 30 years proposed by Mr. Purcell, so that the partnership could "pass wealth to multiple generations". In addition, it appears likely that an immediate dissolution of the Texas FLP would undo any estate tax benefits derived from having an FLP, inasmuch as the Will would then be transferring liquid assets.

Ms. Mathews did not tell her mother that she had invoked the Power of Attorney. Instead, she took steps to hide that fact from her mother. None of the correspondence involving the transfer of assets was sent to Mrs. Glasser. In January 2005, when approximately \$22 Million from Mrs. Glasser's Goldman Sachs account was in the process of being transferred to the Texas FLP, Ms. Mathews wrote to Mr. Torop to instruct him not to send "brokerage and security statements" to Mrs. Glasser. Mrs. Glasser was thus prevented from receiving the Goldman Sachs statement that would have reflected the transfer of all of her assets out of her account.

Ms. Mathews explained her direction to Mr. Torop as being related to her mother's "medical condition". However, she was vague at trial as to whether any doctor had advised her not to tell her mother about her actions or the implementation of the 2002 POA. There is no credible evidence that she was so advised. Dr. Lichtenstein testified that there was no medical reason for Mrs. Glasser not to see her financial reports.

Ms. Mathews was aware of the fact that Mrs. Glasser sometimes went to the bank to ascertain her bank balance - "she'd look at the number, and it was just something she was used to seeing", according to Ms. Mathews. Consequently, she did not transfer all of Mrs. Glasser's assets to the Texas FLP, but instead retained a significant balance in her mother's checking account. Thus, Mrs. Glasser was still able to write checks on her personal checking account and to ascertain in balance.

As late as March of 2005, Ms. Mathews maintained approximately \$240,000 in Mrs. Glasser's personal account. Clearly, just as Ms. Mathews did not want her mother to know that over \$22 Million had been transferred out of her Goldman Sachs account, she did not want her mother to see a reduced bank balance in her personal account or learn that she could no longer write checks on her own account.

There was testimony that Mrs. Glasser customarily wrote checks to her children and grandchildren in the amount of the yearly gift tax exemption. After Ms. Mathews had invoked the POA, Mrs. Glasser used her checking account to write such a check for Mr. Glasser, who had visited her in Florida. When she told Ms. Mathews that she had done so and was going to write such checks for her family as well, Ms. Mathews told her she did not need to do so. What she did *not* tell her mother was that she had already written checks to herself, her husband and her three children on December 30, 2004 from the Broadway National Bank attorney-in-fact account.

Mrs. Glasser had a companion named Oxana, who had cared for Dr. Glasser and continued on with Mrs. Glasser. Oxana lived with Mrs. Glasser in Highland Park and traveled with her to Boca Raton. Oxana was with Mrs. Glasser in Florida in December 2004 and January 2005, but was abruptly terminated in February of 2005.

Ms. Mathews testified that she had visited her mother in Boca Raton in January of 2005, after other relatives had expressed concern about her, and that she was also concerned about Mrs. Glasser's condition after the visit. Ms. Mathews returned to Boca Raton in February of 2005 to check up on Mrs. Glasser. On that visit, Oxana was terminated.

I find that she was terminated by Ms. Mathews, rather than by Mrs. Glasser. Neither Ms. Mathews' assertion that her mother wanted Oxana to be terminated nor her further explanation that Oxana was overmedicating her mother with hypertensive medication were at all convincing. In March of 2005, Mrs. Glasser told Dr. Lichtenstein that her daughter had "fired" Oxana and that she had liked Oxana. In my opinion, it is more likely than not that Ms. Mathews terminated Oxana so that her mother could be cared for by someone she hired, rather than someone with a long-term, independent relationship with Mrs. Glasser and other family members.

Ms. Mathews testified that she attempted to hire a replacement for Oxana to act as her mother's companion. Because the replacement needed two or three weeks to give notice to her then current employer and because Ms. Mathews needed to return to San Antonio and did not want to leave Mrs. Glasser in Boca Raton by herself, they both flew to Texas on February 18, 2005. Ms. Mathews expected to return Mrs. Glasser to Boca Raton when the new companion became available.

The proposed new companion eventually declined the position, for reasons having to do with benefits and job security. Mrs. Mathews testified that she nevertheless continued her plan to return her mother to Boca Raton and that she continued trying to hire a companion to go to Boca Raton with her mother, searching this time in both Florida and Texas.

There appears to be a suggestion by the other parties that Ms. Mathews never intended to return Mrs. Glasser to Boca Raton or New Jersey, but instead planned all along to keep her in San Antonio so that she could begin a guardianship action there. I believe that it more likely than not that Ms. Mathews actually hoped to avoid a guardianship, which would require notice to, and involvement of, other family members and court proceedings. But, by the middle of March 2005, Ms. Mathews was having great difficulty with her mother and decided that a guardianship was necessary. Nevertheless, I also find that Ms. Mathews was preparing for the possibility of a guardianship in the second half of 2004, during which time she was consulting with Ms. Whitehead.

By March 2005, the delay in the return to Boca Raton was clearly bothering Mrs. Glasser, who began to believe that she was being held in San Antonio. Her belief was due in part to her medical condition; inasmuch as Mrs. Glasser did not acknowledge that she needed assistance and could not return to Boca Raton alone. Mrs. Glasser was having a difficult time finding a caregiver she liked. This was, I believe, especially because she was unhappy that Oxana had been terminated by her daughter and she did not like people who patronized her as if she were a child. It appears that Mrs. Glasser was complaining to her son, who was apparently encouraging her belief that she was being held against her will and offering to assist her in leaving San Antonio.

On February 28, 2005, Ms. Mathews sent Dr. Lichtenstein an email in which she advised him, among other things, that her mother's dementia seemed to have worsened and that they had cancelled a return trip to Boca Raton for that reason. She asked him to see Mrs. Glasser. On March 2, 2005, before a scheduled visit with him that day, Ms. Mathews again emailed Dr. Lichtenstein and noted that there were several "troubling incidents" which had happened over the last couple of days.

Dr. Lichtenstein saw Mrs. Glasser, accompanied by her daughter, on March 2, 2005. Dr. Lichtenstein's report contains the following:

Interim History (Last visit 09.22.2004): Ms. Glasser returns for continued follow-up of her Parkinson's Disease and Dementia. She is in San Antonio visiting her daughter and is seen urgently today because of a change in her mental condition. We discussed the following problems:

1. Change in Condition: Suzanne Mathews sent me the following information in an e-mail on February 28, 2005: *"Yesterday, she spoke with my brother for about 10 minutes and afterwards told me it was a very upsetting phone call. She seemed frightened*

*and asked me, 'Mark can't come here, can he?' When I answered, 'No', she said, 'Good'. Later that night I took her blood pressure and it was 149/100. This morning it was 114/77. Since the phone call, she has become sort of docile, sweet and confused, and the paranoia seems to be gone. She can't seem to understand anything about going to Atlanta to see her doctor and just says she doesn't want to go. Her dementia seems to have worsened. She was always a person who liked to be in control and fought me about paying her own bills, but now since the phone call, she's saying she feels overwhelmed and doesn't want to pay them anymore. This is a huge change. Also, I noticed when I took her for a walk today, her gait is not as good as it used to be. Could it be possible she's had a minor stroke?"*

Ms. Mathews e-mailed me again today, commenting on unusual eating habits of her mother - describes taking a hot dog out of a bun and dipping it in beans. Ms. Mathews wonders again if her mom has had a small stroke.

Sitting here today, Mrs. Glasser tells me she feels fine, like her usual self. Doesn't have as much energy or pep. Her daughter hasn't told her about her changes or suspicions about she may have had a stroke - in fact, Suzanne Mathews sits behind her mother and vigorously signals me non-verbally not to tell her mother about the concerns. No changes in Mrs. Glasser's eye sight. No problem speaking. No dizziness or lightheadedness. Has fallen a couple of times - in the dark getting out of bed - hits the floor - no loss of consciousness - no fractures. No weakness focally.

(Bold and italics in original.)

I find it significant that Dr. Lichtenstein did not document any specific mental status findings or deficits of his own, such as confusion or disorientation, but relied instead on the reports from Ms. Mathews - reports that she did not want him to mention in front of her mother. His impression on March 2nd that Mrs. Glasser's "cognitive deficits in 2002 have progress to the point where she meets clinical criteria for being demented" is the same as that in his September 22, 2004 report. He stated that there were no clinical signs of a stroke. He sent Ms. Mathews a copy of his March 2, 2005 report.

On March 11, 2005, Mr. Mathews sent the following letter to Mr. Glasser and Mr. Smith:  
I ask you both to read this letter carefully and think about it after you have done so.

Lillian is not well. She has been diagnosed with dementia. She becomes disoriented, especially when subjected to stress, as when Mark raised his voice at her in two recent extended phone conversations. That was why I phoned Mark and explained, among other things, that his mother is fragile and cannot take argument and disagreeable conversations. This may cause mini-strokes, if not already.

Lillian will have two new care providers, and they will consistently dress Lillian, prepare meals for her, exercise with her, give proper medication, and care for her needs generally. We implore you not to interfere with selection and employment of these individuals' care of Lillian. It is not easy to find care providers who are legal, honest, cheery and reliable, who want to care for someone 84 years old with Lillian's condition and who have impeccable references.

One more thing, Lillian is vulnerable to **elder abuse**. She will sign and execute any instrument without comprehending its significance. If either of you prey on her vulnerability to enrich your position, it will be challenged appropriately. One of you has already been sternly admonished with writing by David Lawrence to cease and desist from discussion of business with Lillian. If Mark becomes the new proxy, then think very carefully of your actions, as there is no reason that we know of why you need to do so.

As I told Mark by phone recently, the world is full of conflict without one having to go look for it. We are not looking for conflict with Mark and the Smith family. We request only your decency and all things good in your communications with your mother and aunt. I have asked my office to sign this letter in my absence from the city.

It appears that this letter was sent in anticipation of Mrs. Glasser's imminent return to Boca Raton. (I note that Mr. Mathews mentioned a mini-stroke, although Dr. Lichtenstein found no evidence of such a stroke.)

By March 12, 2005, events reached something of a crisis. Mrs. Glasser had been in San Antonio much longer than expected and was beginning to believe that she was being held there against her will. She clearly wanted to return to Boca Raton and, due to her mental deficits and Ms. Mathews failure to explain the actions she was taking with respect to the POA, probably did not understand why she could not go alone. According to Ms. Mathews, her mother fired another proposed care giver on March 12th, as a result of which Ms. Mathews cancelled the trip to Florida scheduled for that day because she was unwilling to allow her mother to go alone.

Mrs. Glasser then went out of the house into the street and "wandered" around. When Ms. Mathews was unable to persuade her mother to come inside, she telephoned the police, who eventually brought Mrs. Glasser back into the house. Ms. Mathews also attempted to contact Dr. Lichtenstein.

Mrs. Glasser left the house a second time. Ms. Mathews persuaded her to sit on the curb at the back of the Mathews house. She said that her mother was in a "muddle". However, she testified at trial that she could not remember what they talked about. At that point, Dr. Lichtenstein arrived, and began to talk to Mrs. Glasser alone. Eventually, Dr. Lichtenstein brought Mrs. Glasser back into the house and spoke to Ms. Mathews alone.

Dr. Lichtenstein's report of March 12, 2005, provides, in pertinent part, as follows:

Physical Examination: Mrs. Glasser was awake, alert, and upset. There was no evidence of trauma or injury. She had not fallen. What follows are the things we discussed one-on-one - Mrs. Glasser cried from time to time during our talk. After speaking with Mrs. Glasser for 10-15 minutes outside, we got up from the curb, she took my arm, I carried her purse, and together we walked back into the house. This is a walk up an incline of more than 100 feet - Mrs. Glasser was able to walk up about 10-15 stairs into the back dining area where we continued our discussion at the dining room table. I then met with Suzanne Mathews alone and discussed her mother's concerns - the items below contain Mrs. Mathews' responses:

1. Caregiver issues:

- a. Mrs. Glasser is upset that her caregiver in Florida was fired - she states that Mrs. Mathews thinks the caregiver was poisoning her and therefore did not like her.
- b. Mrs. Glasser states she does not like the new caregiver because she touches her as if she were a child - she does not like to have her head and hair stroked.
- c. Mrs. Mathews notes that her mother helped select the caregiver at times in the past 1-2 weeks expressed nothing but contentment and happiness with the choice.

2. Handling money:

- a. Mrs. Glasser complains that her daughter only lets her have \$2.00 in her purse.
- b. Mrs. Mathews notes that her mother went to Bank of America and cashed a \$5,000.00 check and was walking around with nearly \$6,000.00 cash in her purse. Also notes that her mother opened a new account when she already had one in place at Bank of America.

3. Daughter's Finances:

a. Mrs. Glasser thinks that her daughter and son-in-law are living above their means. Comments that the Mathews are buying a factory and worries that they will take her money to finance it.

b. Mrs. Mathews verifies that they did buy a factory, but her mother's finances had nothing to do with the transaction.

Need for help:

a. Mrs. Glasser feels that she can take care of herself, although she does recognize that it would be good for her to have someone with her at nighttime. She is worried that phone calls aren't getting through to her from the outside - she has trouble calling out on her daughter's phones because there are too many buttons - does not know how to get an outside line. She can remember some 10-digit phone numbers, but not consistently.

b. Mrs. Glasser wants help from people she knows - using my cell phone we called:

i. Nephew, Richard Smith, at his mother, Lorraine's home (561-655-3960) - no answer, left a message on the answering machine. Mr. Smith called me at my home at about 9:00 p.m. CST this evening for a general discussion - he expressed concern for Mrs. Glasser's welfare and asked me to record things in a way that I would remember them.

ii. Joan Kern (732-257-3185) - Mrs. Kern is a nurse who worked for Mrs. Glasser's late husband, Dr. Ben Glasser, for -40 years. Mrs. Kern also expressed concern for Mrs. Glasser's welfare and offered to do what she could to help.

c. Mrs. Mathews comments that:

i. The nephew, Mrs. Smith, has tried to take advantage of Mrs. Glasser in the past.

ii. Mrs. Kern is ill (from long term sequelae of hepatitis) and may be help in the short term, but not the long term.

Because Mrs. Glasser was so upset, she walked out of her daughter's home to get help for herself. She feels trapped here in San Antonio.

#### **Plan:**

1. We all agreed that Mrs. Glasser needed a caregiver before she could safely return to Florida.

a. Mrs. Glasser will participate in the selection process again.

b. Mrs. Glasser will honestly say if she likes someone and not agree to a particular caregiver just to go along with her daughter.

c. Joan Kern will be contacted and perhaps come to San Antonio for a few days to help with the interview and selection process.

2. Trial of Seroquel 25 mg BID (#60 x 3)

a. Mrs. Glasser agreed to take this medication if she was upset, rather than walk out of the house.

b. She has received this medication before when she was delirious after her hernia surgery in 2004.

c. Suzanne Mathews will explore becoming the guardian of her mother's person:

d. Finances have been set up in such a way that Mrs. Glasser's assets are safe and will be used to support her appropriately, according to Ms. Mathews.

e. In 2002 I gave Ms. Mathews a letter to activate her financial Power of Attorney on her mother's behalf.

f. Given the potential family issues and the likely progression of Mrs. Glasser's Parkinson's disease and Dementia, a guardianship of person would be appropriate.

3. Will follow-up as needed.

(Bold in original.) As noted in f., above, Dr. Lichtenstein recommended that Ms. Mathews seek the appointment of a guardian.

I note that, according to Dr. Lichtenstein's contemporaneous record, Mrs. Glasser (1) was upset that Oxana had been fired by Ms. Mathews, (2) did not like the new caregiver because of the way she treated her, touching her "as if she were a child", (3) was concerned that her contact with others was being prevented, (4) wanted to talk to Mr. Smith and Ms. Kern for help, but did not ask to contact Mr. Glasser, and (5) felt trapped in San Antonio. I also note that Ms. Mathews disparaged Mr. Smith to Dr. Lichtenstein on the basis of the patently false accusation that he tried to take advantage of Mrs. Glasser in the past. The reference by Mrs. Glasser to Ms. Mathews' belief that Oxana was poisoning her apparently relates to the alleged overmedicating mentioned above.

While Mrs. Glasser did have mild to moderate dementia at the time, I am convinced that she was generally able to express her views on those issues accurately and that her views were not merely the product of her dementia or primarily delusional. This is not to say that I believe that she had no significant cognitive problems that were adversely affecting her behavior or thinking processes.

Neither Mrs. Glasser nor Dr. Lichtenstein was aware of all of the facts at the time. For example, Dr. Lichtenstein testified that he would like to have known about the transfer of the assets at the time he was evaluating Mrs. Glasser's allegedly delusional conduct and prescribing Seroquel in March of 2005.

With respect to Mrs. Glasser's concerns about money, there is no question that, by early March of 2005, Ms. Mathews had already transferred most of Mrs. Glasser's assets, including her home in Highland Park, out of her name. It is not clear from the record whether Mrs. Glasser had actually discovered those transfers by that time, although Ms. Mathews apparently did not tell her until after the guardianship action was filed in Texas. However, it appears likely that, at least in San Antonio, Ms. Mathews was trying to limiting the amount of cash her mother could carry around, a task made difficult by her decision to continue her mother's access to the bank account with the large balance.

Mrs. Glasser was concerned that her assets might have been used by the Mathews for a business venture about which there was testimony during the trial. There was certainly no proof at trial that any of Mrs. Glasser's funds were used for that purpose. However, there is no reason to believe that Mrs. Glasser had not noticed that she was no longer receiving regular Goldman Sachs statements or that she had forgotten about the Goldman Sachs account. Ms. Mathews herself acknowledged that Mrs. Glasser liked to check account balances. It is quite likely that Mrs. Glasser had noticed that she was no longer receiving Goldman Sachs reports and had developed concerns about the whereabouts of her funds. Given the facts as outlined above, it cannot be concluded that Mrs. Glasser's concerns about money were totally the product of delusion, although it does appear that Mrs. Glasser was incorrect in her fear that the Mathews used her money to fund their business venture.

Dr. Lichtenstein made findings of delusions with respect to "[s]udden changes in beliefs", "[i]ncorrect assumptions about finances", and "[u]nsafe decision making - e.g., walking out of house into neighborhood". Although I have no doubt that Dr. Lichtenstein was correct that the dementia was clinically present and interfering with Mrs. Glasser's cognitive abilities, it is also

clear that Dr. Lichtenstein was making his medical judgments about the extent of the problem in significant part based upon his having accepted as accurate Ms. Mathews' recitation of the facts, both as to accuracy and completeness - something I am *not* prepared to do based upon the testimony in this case and my view of her credibility.

I find that Mrs. Glasser's underlying moderate dementia was being exacerbated by Ms. Mathews' conduct with respect to isolating Mrs. Glasser from familiar caretakers and relatives and in taking control of her finances without in any way informing her of what was going on. In addition, although it appears clear to me that Ms. Mathews was actually attempting to find someone to accompany her mother back to Boca Raton and that Mrs. Glasser was rejecting some of the candidates, the delay clearly caused Mrs. Glasser to feel that she was being kept in San Antonio longer than she wanted to be there.

On March 14, 2005, Mr. Glasser apparently arranged for a taxi to pick his mother up at the Mathews home as part of a plan to return her to Boca Raton without Ms. Mathews' knowledge. Ms. Mathews contacted the San Antonio Police, which had the taxi return Mrs. Glasser to the Mathews home. Later that day, Ms. Mathews filed an Application for Appointment of a Guardian in the Bexar County (Texas) Probate Court No. 1, which sits in San Antonio, Texas, where Mrs. Mathews and her husband live. ("Bexar" is pronounced with the "x" silent, as if spelled "Bear".)

In her Application, Ms. Mathews stated that her mother's "address" was 243 Encino Drive, San Antonio Texas, which was actually the Mathews' address. No mention was made of Mrs. Glasser home in Highland Park or her long association with New Jersey.

In Paragraph 11 of the Application, Ms. Mathews made the following assertion:

A general description of the Proposed Ward's property, including any compensation, pension, insurance, or allowance to which the Proposed Ward may be entitled, is as follows: *unknown*.

(Emphasis added). In the verification under oath, Ms. Mathews represented that the Application "contains a correct and complete statement of the matters to which it relates and all the contents hereof are true, complete and correct".

Clearly, Ms. Mathews had extensive knowledge of her mother's assets based upon the financial transactions she had completed over the preceding four or five months. Although she claims that one of her prior attorneys, Ms. Whitehead, advised her to put "unknown", the fact remains that it is a patently false statement under oath. In the Application, Ms. Mathews also listed Mr. Glasser's address as unknown, even though Mr. Mathews had sent him a letter just a few days before.

After a hearing on March 14, 2005, the Honorable Polly Jackson Spencer entered an order making a finding that Mrs. Glasser "appears to be partially incapacitated" and appointing Ms. Mathews as temporary guardian of her mother's person and property. The order also provided that Ms. Mathews' POA would remain in effect during the temporary guardianship. Karen Pe~n~a, Esquire (Ms. Pe~n~a), was appointed to act as Mrs. Glasser's attorney ad litem.

Issue was subsequently joined in Texas by Mrs. Glasser, Mr. Glasser and Mr. Smith, who raised issues with respect to the various financial transactions entered into by Ms. Mathews under the 2002 POA and opposed the appointment of Ms. Mathews as guardian.

In mid-March, Ms. Mathews rented an apartment for Mrs. Glasser and arranged for caregivers to provide full-time assistance for her mother. Mrs. Glasser began living in the apartment on or about March 17, 2005. Mrs. Glasser continued to believe that she was being held in San Antonio against her will. There was apparently one attempt, presumably involving Mr. Glasser, to "rescue" Mrs. Glasser through a phony caregiver and several attempts by Mrs. Glasser to "escape" by getting out of cars during travel. (At that time, of course, Mrs. Glasser was being kept in San Antonio with the permission of Judge Spencer, however involuntarily from Mrs. Glasser's point of view.)

On April 6, 2005, Ms. Mathews caused Mrs. Glasser to be admitted to the geropsychiatry unit at the Nix Medical Center in San Antonio. The admission took place one day before Mrs. Glasser was scheduled to appear in court for a hearing before Judge Spencer on the issue of visitation by family members. While Ms. Mathews characterized the admission as an “emergency”, she admitted that the incidents that led her to take the action had taken place several days before. Of particular significance, in my view, is the fact that she did not consult with Dr. Lichtenstein in advance with respect to the admission. I do not credit her testimony that she did so or that it was Dr. Lichtenstein who recommended the Nix.

The Nix intake document indicates that Ms. Whitehead, Ms. Mathews' then attorney, was the “referral source” to the Nix. Ms. Whitehead emailed Dr. Lichtenstein on the same day as the Nix admission to remind him about the hearing the following day and advise him that the admission had taken place. However, there was no explanation of why Dr. Lichtenstein was not involved in the decision-making process about the Nix admission or in Mrs. Glasser's treatment while at the Nix.

At the Nix, Mrs. Glasser's dosage of Seroquel was increased to a total of 500mg per day. Seroquel is a psychotropic medication used in the treatment of bipolar disorder and schizophrenia. In the past, it has apparently been used by some physicians to settle agitated elderly patients with dementia. At the time of his March 12, 2005 visit with Mrs. Glasser at the Mathews residence, Dr. Lichtenstein had initially started Mrs. Glasser on 25mg twice a day, which may have been increased to 50mg twice a day at some point. 500mg a day is a very significant increase.

On May 3, 2005, Mr. Smith submitted to the Surrogate of Middlesex County, New Jersey, a Verified Complaint seeking the appointment of a conservator in New Jersey, pending determination of Mrs. Glasser's competency, and also seeking other relief. The proposed Order to Show Cause sought temporary restraints, including a provision that would have prohibited Ms. Mathews from exercising her authority under the Texas Temporary Guardianship Order and the Power of Attorney. Because the Honorable Robert A. Longhi, A.J.S.C., who was then the Probate Part judge, was not [ ] illing to enter temporary restraints, the proposed temporary restraining order was not entered.

On May 13, 2005, Judge Spencer continued Mrs. Mathews' appointment as temporary guardian and also continued her authority to act under the POA previously given by Mrs. Glasser.

On June 2, 2005, Mr. Smith filed an Amended Verified Complaint in New Jersey, which commenced the present action. Judge Longhi entered an Order to Show Cause, without any temporary restraints, returnable in July of 2005. The return date was subsequently adjourned several times because of the pendency of the proceedings in Texas.

On June 14, 2005, Judge Spencer entered an order requiring Ms. Mathews to account for her handling of her mother's assets under the 2002 POA and to permit the examination of the records of the Texas FLP. Ms. Pe~n~a testified at trial, truthfully in my view, that she had a very difficult time obtaining Mrs. Glasser's financial information from Ms. Mathews and eventually had to file a motion to do so.

On July 12, 2005, Judge Spencer appointed Stephen Jody Helman, Esquire, as guardian *ad litem* for Mrs. Glasser. Mr. Helman eventually brought about a change in the funding of the Texas FLP, by withdrawing approximately \$5 Million to fund Mrs. Glassers' living expenses and by removing her Highland Park residence from the Texas FLP and putting it in a separate entity. These actions, which addressed concerns about conflicts and the viability of the Texas FLP, were taken in October of 2005.

Mr. Helman filed his first report as guardian *ad litem* on July 29, 2005. In the report, Mr. Helman noted that Mrs. Glasser was “unhappy with her current living arrangements in San Antonio” and that she had “repeatedly expressed her desire to return to her home in New Jersey.” Indeed, he suggested that her “inability to live in her own home is a continuing source of distress for her that may actually be aggravating her physical and mental condition.” He also noted Mrs. Glasser's desire to spend time “in the apartment [in Boca Raton, Florida] that Mrs. Glasser and her family have used as their vacation home for many years.” He recommended that Mrs. Glasser be permitted to travel to New Jersey and Florida, with certain safeguards and restrictions outlined in his report.

On August 10, 2005, Ms. Kern filed an application in Texas to be appointed substitute guardian of Mrs. Glasser's person. Her application was based upon a document, signed by Mrs. Glasser on August 3, 2005, expressing a preference that Ms. Kern be designated as guardian of the person. (It also provided that Mrs. Glasser's property should be administered by a bank, but did not specify a particular bank for that purpose.) The document, which was signed after Judge Spencer's preliminary determination of incapacity, was witnessed by Ms. Pena. The document also requested that Ms. Mathews, Mr. Glasser and Mr. Smith not be appointed to serve in any fiduciary capacity.

On August 17, 2005, Judge Spencer signed an interim order allowing Mrs. Glasser to travel to New Jersey, and subsequently to travel among New Jersey, Florida and Texas under certain conditions set forth in the order. Those conditions included the consent of various parties and fiduciaries involved in the case and the provision of care on a 24-hour basis. It appears that Judge Spencer took this action, in large part, because there was a consensus among various health care providers and others that Mrs. Glasser was unhappy in Texas and that she would benefit from the more familiar surroundings of Boca Raton and Highland Park.

The parties are in disagreement as to whether some of the visitation conditions were intended to protect Mrs. Glasser or to keep her inappropriately isolated. I find that *some* actions taken by Ms. Mathews, *prior* to Mr. Helman's involvement, were intended to isolate her mother and her financial records from individuals, such as Ms. Pena and Mr. Smith, who might have questioned Ms. Mathews' financial transactions and her control of Mrs. Glasser's living and travel arrangements. However, there was a reasonable basis for concern that Mr. Glasser's conduct was overly exciting his mother and having a detrimental effect on her health. In particular, Mr. Glasser was urging his mother not to take medications prescribed by her treating physicians, which issue is discussed further below. I am confident, however, that Mr. Helman's involvement in the visitation guidelines was taken in good faith and for Mrs. Glasser's benefit.

Although the order prohibited those involved in the case from interfering with compliance with the order, it also stated, in Paragraph 9, that the order would "not be construed to restrict any rights or privileges Mrs. Glasser may enjoy under the constitution or statutes of any other jurisdiction in which Mrs. Glasser may reside."

Mrs. Glasser returned to New Jersey on August 17, 2005, and lived at her Highland Park home under the 24-hour monitoring mentioned above. She was seen by Dr. Freedman in New York to monitor her medical condition. He became very concerned because Mrs. Glasser was not consistently taking her medication, which he concluded was having an adverse effect on her blood pressure and level of agitation. He was particularly concerned about her starting and stopping the Seroquel. It appears that there was some improvement with respect to the medication compliance and the blood pressure by the early part of September 2005.

On September 13, 2005, however, Dr. Freedman notified Mr. Helman by email that Mrs. Glasser was "not doing well" in New Jersey and that "the experiment in New Jersey [was] on the verge of failure". Julie Wolf, a social worker and geriatric care manager from Texas who was monitoring Mrs. Glasser's care while in New Jersey, also emailed Mr. Helman on September 13th, setting forth her concerns about the situation in New Jersey. Those concerns included agitation resulting from visitors and telephone calls, as well as the intermittent compliance with medications. While there had been improvement, she thought they were still of concern. I believe both Dr. Freedman and Ms. Wolf were acting in good faith.

On September 14, 2005, the Board, acting as the adult protective services agency in Middlesex County pursuant to [N.J.S.A. 52:27D-407](#), filed a Petition for Protective Services and submitted a proposed Order to Show Cause with Temporary Restraints. The purport of the Petition was that Mrs. Glasser was not incapacitated, but rather that she was a "vulnerable adult" in need of protective services because she was being held in Texas and New Jersey against her will and was being inappropriately kept in isolation. It appears that Mr. Glasser was involved in seeking the intervention of the Board.

Because the restraints were sought *ex parte*, I held a hearing, on the record, on September 14, 2005, attended only by counsel for the Board, to determine whether it would be appropriate to grant any *ex parte* restraints. *See R. 4:52-1(a)* and *R. 4:67-2(a)*. I was unwilling to enter the broad range of temporary restraints sought by the Board, but was satisfied that if I entered an order

to show cause with no temporary restraints at all, there was a substantial likelihood that Mrs. Glasser would be removed from the State of New Jersey before I could consider the Board's application in the presence of counsel for other interested parties.

Consequently, I entered an Order to Show Cause with Temporary Restraints on September 14, 2005 (TRO), which required immediate notice to be given to all interested parties and any known attorneys and requiring all parties to appear on September 16, 2005, at which time I would consider the Board's application further. The TRO prohibited the removal of Mrs. Glasser from the State of New Jersey pending the September 16, 2005 hearing, in essence preserving the status quo until notice could be given to all interested parties.

Unfortunately, the Board failed to serve Ms. Mathews' New Jersey attorney and Mrs. Glasser's caregivers with the TRO immediately after it was entered. I do not credit Ms. Kern's testimony that she told Mrs. Glasser's caregivers that TRO had actually been entered. However, I am satisfied that she inadvertently disclosed that one was being sought that day and that her disclosure was transmitted to San Antonio. There was also evidence at the trial that Mr. Helman, and therefore presumably Ms. Mathews, were already aware that an emergent application in New Jersey was in the works, although they did not know the precise timing.

On September 14th, Mrs. Glasser was scheduled to attend an independent medical examination by a geriatric psychiatrist in connection with the incapacity proceedings in Texas. Ms. Kern went to Mrs. Glasser's house so that she could go to the examination with Mrs. Glasser. There was apparently a dispute as to whether Ms. Kern would be allowed to go with her, with Ms. Mathews being opposed and Mr. Helman having given his consent.

After Ms. Kern had made her disclosure about the court application that day, Batsheva Schreiber, the geriatric care manager who was supervising the caregivers assigned to Mrs. Glasser, received instructions from one of Ms. Mathews' attorneys that the doctor's appointment was cancelled, that Mrs. Glasser would be returning to Texas and that she should get Mrs. Glasser out of her house as soon as possible. Mrs. Glasser was then taken from Highland Park by Ms. Schreiber and some of her caregivers, and kept in various places on Staten Island until arrangements could be made to fly her back to San Antonio from an airport in Westchester. Mrs. Glasser was taken from her house in such haste that she arrived in Texas without any of her medications. Dr. Lichtenstein testified to his opinion that the sudden return from New Jersey to Texas was destabilizing for Mrs. Glasser.

Ms. Schreiber's testimony that she took Mrs. Glasser to Staten Island merely to find a kosher delicatessen was not at all credible. Her instructions were clearly to take Mrs. Glasser outside this Court's jurisdiction so that the TRO could not be served prior to the flight back to San Antonio from a New York airport.

While I am satisfied that Mrs. Glasser was removed from New Jersey prior to service of my TRO, it is quite clear that both Ms. Mathews and Mr. Helman were well aware that efforts were being made to get before a New Jersey court on an expedited basis on the day of Mrs. Glasser's precipitous removal from New Jersey. Mr. Helman's filed a certification in this action stating that his understanding that efforts were being made to invoke this Court's jurisdiction, together with his concerns about Mrs. Glasser's health, caused him to feel "that having Mrs. Glasser return to Texas was in her best interests."

I have no doubt, however, that the application before me on September 14, 2005 was the sole reason for the precipitous nature of Mrs. Glasser's trip to Texas. Certainly, there was no medical emergency to justify those actions. This is not to say, however, that there was no factual basis for concern about Mrs. Glasser's medical condition while in New Jersey - a concern related in part to the activities of Mr. Glasser and the so-called "circle of friends" in New Jersey.

There were several troubling aspects of Mrs. Glasser's visit to New Jersey. One relates to her compliance with medication, which had been an issue in Texas as well. Mrs. Glasser was clearly being urged by Mr. Glasser and others not to take her medications. Particular troubling was the involvement of a New Jersey physician, who was a family friend but *not* her treating physician, who apparently advised her not to take one or more of the medications prescribed by her actual treating physicians.

The primary controversy involved Seroquel. There was, in my view, a legitimate concern about the use of Seroquel to control Mrs. Glasser's dementia-related agitation, especially at 500mg per day. Dr. Teresa Schaer, M.D. (Dr. Schaer), who testified at the trial as a court-appointed expert, described Seroquel at the 500mg level as a "chemical restraint". In addition, I note that the manufacturer's website - [www.seroquel.com/conssch/index.asp](http://www.seroquel.com/conssch/index.asp) - now warns against use with dementia patients for health reasons, which were mentioned during the trial. Nevertheless, it was at the time prescribed by Mrs. Glasser's treating physicians at the time, based upon their then knowledge.

The primary problem, however, was that Mrs. Glasser was also non-compliant with depression, Parkinson's and hypertension medication. Her failure to comply with the latter was having an adverse effect on her blood pressure, which caused Dr. Freedman's concern. It is apparent that, *even if* Mrs. Glasser was only being told not to take Seroquel, she was non-compliant with a number of medications because of her cognitive deficits. It appears that he was only able to obtain compliance by threatening Mrs. Glasser with hospitalization if her blood pressure remained too high.

I believe that it was very inappropriate for laypeople, and especially a physician not involved in treatment or consultation, to interfere with medication compliance in the manner done in this case. Their conduct put Mrs. Glasser at risk.

The second troubling aspect relates to the involvement of Mr. Glasser, and what was referred to at trial as a "circle of friends", in regularly discussing the litigation (and medication) with Mrs. Glasser, thereby increasing her agitation. Those individuals also failed to follow the visitation guidelines as to times and lengths of visits at times.

This is a very difficult issue to parse through because there are competing interests involved, both related to protecting Mrs. Glasser's best interests. I am convinced that Ms. Mathews was at times deliberately isolating Mrs. Glasser from meaningful contact with those who were seeking to aid her, particularly Mr. Smith and at times Ms. Pen~a, for reasons related to her desire to control Mrs. Glasser's assets to the disadvantage of her brother. Mr. Glasser was, largely in good faith, attempting to assist his mother in protecting her rights and assets, some of which he had a reasonable expectation would one day benefit him. All of those issues, however, were the subject of ongoing litigation.

There was, however, a clear and overarching need to provide Mrs. Glasser with a safe and stable environment - free from agitation and controversy that would impair her physical or psychological wellbeing. I am firmly convinced that Mr. Glasser and some of those allied with him were doing Mrs. Glasser more harm than good in that regard by dwelling on the merits of the litigation, disparaging Ms. Mathews and encouraging Mrs. Glasser not to take medications. This was especially true of Mr. Glasser because of his propensity to engage in hyperbole and inflammatory language.

Because I believe Mr. Helman was acting in good faith, I must conclude that Mr. Glasser and the "circle of friends" were primarily responsible for the failure of what Dr. Freedman referred to as "the experiment in New Jersey", largely because of the threat to Mrs. Glasser's health resulting from her non-compliance with medications. In essence, they provided the occasion, or pretext, for the decision to return Mrs. Glasser to Texas. In contrast, Mr. Smith was not engaging in that sort of conduct, but was genuinely concerned about Mrs. Glasser's wellbeing and acting in a generally responsible manner.

The third troubling aspect relates to the extent to which misinformation is reflected in Dr. Freedman's assessment of Mrs. Glasser's condition. He saw Mrs. Glasser on August 22, 2005. Although the home-caregiver's notes clearly reflect that Mrs. Glasser had been vomiting that day, Ms. Schreiber told Dr. Freedman that Mrs. Glasser's report of vomiting was not accurate. I understood Dr. Freedman to testify that he might have reached some different conclusions had he known that Mrs. Glasser had in fact been vomiting.

On September 29, 2005, Ms. Pen~a filed an application in Texas to remove Mrs. Mathews as temporary guardian. Mr. Helman made a similar application. On October 19, 2005, Judge Spencer accepted Mrs. Mathews' voluntary resignation as temporary guardian and appointed Daniel A. Naranjo, Esquire, as successor temporary guardian. The operation of the 2002 POA was also suspended at that time.

On November 10, 2005, the Board filed a second Verified Complaint in the present action, seeking the appointment of a conservator or guardian and taking the position that Mrs. Glasser was likely incapacitated. Again I was requested to enter an *ex parte* Order to Show Cause with Temporary Restraints, which I declined to do. However, I entered an order on November 16, 2005, scheduling a case management conference to consider all of the pending issues.

A trial was to have taken place in Texas on December 5, 2005. However, Mr. Glasser filed a petition for removal to the United States District Court for the Western District of Texas, San Antonio Division, and the trial was postponed. The Honorable Fred Biery, U.S.D.J., remanded the guardianship matter to the Texas court on December 28, 2005, in response to Ms. Mathews' application. The trial was rescheduled to March 29, 2005. In January of 2006, Judge Spencer entered an order permitting Mrs. Glasser to travel to Boca Raton.

On March 3, 2006, I determined that New Jersey should exercise primary jurisdiction with respect to Mrs. Glasser because she had been a long-time domiciliary of New Jersey and continued to be a New Jersey domiciliary at the time the Texas proceedings were commenced. Although Judge Spencer had already determined that there was jurisdiction over the matter in Texas, my decision concluded that New Jersey's jurisdiction should be primary as a matter of New Jersey's public policy. Judge Spencer subsequently entered an order staying the Texas proceedings.

At my request, Mr. Naranjo continued as the temporary guardian in the New Jersey action after the Texas action was stayed. On July 11, 2006, at Mr. Naranjo's request, I replaced him as temporary guardian with Gary Ben Cornick, Esquire (Mr. Cornick), an attorney practicing in Middlesex County.

During the trial, several medical and mental health professionals either testified or their reports were admitted into evidence. While they did not reach precisely the same conclusions, the overall consensus of their evidence was that Mrs. Glasser (1) suffers from dementia that is either moderate or severe and (2) is generally unable to govern herself or manage her affairs. The testimony of Drs. Lichtenstein and Freedman, both of whom I found to be credible witnesses, has already been discussed.

Dr. Schaer, who is the Chief of the Division of Geriatrics at Saint Peter's University Hospital, was appointed by the Court to examine Mrs. Glasser. Although she agreed that Mrs. Glasser is demented, she was of the view that Mrs. Glasser's dementia was mild. She summarized her findings as follows:

\* \* \* Lillian Glasser is much more limited by her physical abilities than her mental capacity. Although she has an early dementia, it is not limiting her capacity to understand important details in her life and she is clearly able to make decisions for herself. I believe the dementia that she has is the dementia associated with Parkinson's disease, which is very similar to Alzheimer's, and is slowly progressive.

Her test results demonstrated that she retains good judgment and insight in general. Caregivers may question this because she is described as resisting help on many occasions and this may be misinterpreted as poor insight and judgment. It more likely represents her frustration with her physical limitations and desire to be independent again. In addition, personality changes which may accompany any dementia can also become apparent during physical care giving, but do not limit her capacity to make decisions. She is highly capable of carrying on a meaningful conversation with someone whom she perceives as being interested in helping her on her own terms and she is very clear about her understanding of the relationships that she has had with her children.

While I have absolutely no doubt that Dr. Schaer reached her conclusions in good faith, I am convinced, based upon the testimony and reports of the other experts, that her conclusions understate the level of Mrs. Glasser's dementia and overstate the level of her ability to and care for herself. However, Dr. Schaer was of the opinion that, at the very least, Mrs. Glasser is a vulnerable adult in need of protection by the Court, especially with respect to the management of her financial affairs.

Dr. Mark Siegert, Ph.D. (Dr. Siegert) is a forensic psychologist who performed an evaluation of Mrs. Glasser at the request of the Court. Dr. Siegert's evaluation included in depth psychological testing. It was evident during the trial that Mrs. Glasser and Dr. Siegert did not always get along, because he frequently pressed Mrs. Glasser when she sought to deflect some of the questions related to the testing. Although there were suggestions during the trial that Dr. Siegert's results were skewed because of that, I am satisfied with his explanation that someone with dementia will attempt to avoid giving responses about which they are unsure and become argumentative when pressed. Consequently, I believe Dr. Siegert's conclusions are entitled to significant weight.

Dr. Siegert's findings can be summarized as follows:

- Mrs. Glasser has a moderate to severe level of dementia;
- Mrs. Glasser does not have the cognitive capacity to meaningfully participate in major decisions regarding her healthcare and finances;
- Mrs. Glasser requires a court-appointed guardian with significant experience for both person and property;
- The guardian needs to be a strong person in order to be able to withstand the continuous pressure by various parties;
- Mrs. Glasser should be able to make some decisions for herself, including who visits her and where she resides at various times throughout the year (with the caveat that her wishes are not to be followed if they are impulsive or show bad judgment);
- Mrs. Glasser is extremely vulnerable to outside influences, particularly when people seem to support her wish to see herself as unimpaired;
- Mrs. Glasser does not have the capacity to meaningfully participate in decisions regarding her medical treatment, financial arrangements, testamentary capacity and donative intent.

Dr. James Foley, M.D. (Dr. Foley), who specializes in geriatrics, examined Mrs. Glasser at the request of the Board. Dr. Foley was of the opinion that Mrs. Glasser is incapacitated and unable to govern herself and manage her affairs. He based his conclusions on her profound short-term memory loss, the fact that she was very easily confused, and her obvious difficulty in organizing her thoughts. Dr. Foley concluded that Mrs. Glasser suffered from severe short-term memory loss, a great deal of tangentiality, severe word-finding difficulty, a significant degree of long-term memory impairment and poor judgment.

Dr. Martha Leatherman, M.D. (Dr. Leatherman) examined Mrs. Glasser in connection with the Texas proceedings. Her report was admitted in evidence. She is a Diplomate of the American Board of Psychiatry and Neurology. As a result of her examination of Mrs. Glasser, Dr. Leatherman concluded that Mrs. Glasser had moderate to severe dementia and is totally incapacitated. Dr. Leatherman also expressed her belief that Mrs. Glasser would never “accept living away from her homes in Florida and New Jersey” because of “strong emotional ties to those places”. As a consequence, Dr. Leatherman opined that Mrs. Glasser was “likely to deteriorate more rapidly if she stays in San Antonio” and that she was unsure that “the benefits of increased monitoring [] in San Antonio will offset the deleterious effects of her grieving for home.”

## **II - Conclusions of Law**

I make the following Conclusions of Law. Although I am discussing some of the factual bases for those Conclusions here, they are based upon all of the Findings of Fact set forth above

(1) - Incapacity - Mrs. Glasser is currently incapacitated, as that term is used in *N.J.S.A. 3B: 1-2*, due to dementia caused by either Parkinson's Disease or Alzheimer's Disease, or a combination of the two. Although Mrs. Glasser undoubtedly has relatively

lucid moments, their occurrence is unpredictable and will diminish overtime. Mrs. Glasser's cognitive deficits render her overly susceptible to undue influence, in addition to causing her to be unable to govern herself and her affairs.

(2) - Type of Guardianship - (a) Mrs. Glasser is in need of a guardian of her person and property. Mrs. Glasser's incapacity is sufficiently severe that she requires a general guardian, as described in *N.J.S.A. 3B:12-24.1a*. A limited guardian, as described in *N.J.S.A. 3B:12-24.1b*, would be inappropriate in view of her medical condition. Although a court must act with care in determining what decisions are to be taken away from the ward (*In re Farnkopf*, 363 N.J. Super. 382, 391 (App. Div. 2003)), the medical evidence supports the conclusion that Mrs. Glasser's condition is moderate to severe, will grow progressively worse and, perhaps most significantly, that her cognitive abilities will vary from day to day and that the level of her cognitive abilities cannot be predicted in advance. And, as noted above, she is overly susceptible to undue influence.

(b) However, pursuant to the spirit of *N.J.S.A. 3B: 12-57g*, the guardian of the person shall “encourage [Mrs. Glasser] to participate with the guardian in the decision-making process to the maximum extent of [her] ability” and shall consider, but not be bound by, Mrs. Glasser's views with respect to issues such as where to reside or visit, with whom to visit or speak on the telephone, what medical treatments to receive and what sort of gifts to make to employees, caregivers, friends and relatives, consistent with her general past practices. Because there is a history of her non-compliance with medications causing medical problems, Mrs. Glasser's views with respect to medications ought to be considered, but should be given less weight than her views with respect to medical matters such as surgeries, invasive treatments and potentially debilitating therapies.

The guardian of the person shall also “encourage [Mrs. Glasser] to act on [her] own behalf whenever [she] is able to do so”, particularly with respect to the activities of daily living and similar types of activities. Based upon the medical testimony, however, it is very unlikely that Mrs. Glasser will “develop or regain higher capacity to make decisions in those areas in which [she] is in need of guardianship services”, although the guardian should engage her to participate in the decision making process “to the maximum extent possible” so that her cognitive abilities are maintained as long as possible and so that she feels that she has as much control over her own life as is consistent with her medical condition.

(3) - Testamentary Capacity - (a) In 2002, Mrs. Glasser had sufficient capacity to make a will and a power of attorney. As discussed above, there is a “relatively low threshold” and a presumption of testamentary capacity. *In re Will & Testament of Liebl*, 260 N.J. Super. at 524. No party has presented clear and convincing evidence (*ibid*) that, in 2002, Mrs. Glasser was unable to “comprehend the property [she was] about to dispose of; the natural objects of [her] bounty; the meaning of the business in which [she was] engaged; the relation of each of these factors to the others, and the distribution that [was] made by the will.” *In re Livingston's Will*, 5 N.J. at 73.

(b) I find by clear and convincing evidence that, as of the time of the trial, Mrs. Glasser's dementia has progressed to the extent that she no longer has testamentary capacity.

(4) - Undue Influence - (a) In 2002, Ms. Mathews had a “confidential relationship” with Mrs. Glasser. *Haynes v. First Nat'l State Bank*, 87 N.J. 163, 176 (1981) (A “confidential relationship” arises “where trust is reposed by reason of the testator's weakness or dependence or where the parties occupied relations in which reliance is naturally inspired or in fact exists”). Ms. Mathews was accompanying Mrs. Glasser to doctor visits and meetings with Mr. Purcell. Dr. Freedman, for example, understood in 2002 that Ms. Mathews was helping Mrs. Glasser make decisions, which is one reason why he did not think that decision making needed to be taken away from her given the then mild nature of her dementia.

(b) There were suspicious circumstances surrounding the preparation and execution of the Will and POA in December of 2002. *Haynes v. First Nat'l State Bank*, 87 N.J. at 176 (The “suspicious circumstances” “need be no more than ‘slight’ ”.). The “suspicious circumstances” in this case were, in my opinion, significantly more than “slight”.

- In December 2002, for the second time that year, Ms. Mathews took her mother to see Mr. Purcell to have him implement estate planning at a time when she was recovering from post-operative delirium. (The first event was the effort to replace Mr.

Smith as the Trustee of the Marital Deduction Trust, which eventually resulted in the dissolution of the Trust.) Mrs. Glasser was released from the hospital after hip replacement surgery on December 4, 2002 and Ms. Mathews initiated the contact with Mr. Purcell on December 6th.

- In October, before the surgery, Mrs. Glasser had executed a new Will and Power of Attorney, which was drafted by the law firm that handled Dr. Glasser's Estate and without any involvement by Ms. Mathews. Just after the surgery, as a result of which there was an episode of post-operative delirium, there was suddenly an urgent need for new estate planning documents. I do not credit Ms. Mathews' explanation that they were her mother's idea because she felt pressured into having the neutral fiduciaries named in the estate planning documents drafted by the Paul Weiss firm. Those neutral entities all appear to be entities that had some prior relationship with Mrs. Glasser.

The Will and Power of Attorney drafted by Mr. Purcell did significantly more than just change the identity of the fiduciaries, as described above. Of particular significance, the Will disinherited any legitimate surviving issue, including adopted children, of Mr. Glasser in favor of Ms. Mathews or her children. The Power of Attorney gave Ms. Mathews the authority to act alone as attorney-in-fact.

- There was great urgency in having the Will and POA drafted and executed, such that Mr. Purcell had to work over the weekend so that it could be signed the following Monday, even though Mrs. Glasser was not leaving for Boca Raton until later in December of 2002 or early January of 2003. There has been no credible or satisfactory explanation of why those new documents were needed.

- Ms. Mathews did not disclose to Mr. Purcell the findings of cognitive deficits and dementia by both Dr. Lichtenstein and Dr. Freedman earlier that year.

(c) Because there was a confidential relationship and suspicious circumstances, there is a presumption of undue influence. *In re Will of Catelli v. Villone*, 361 N.J. Super. 478, 486 (App. Div. 2003) (“When a will benefits one who enjoyed a confidential relationship with the testator, and where there are suspicious circumstances surrounding the will, the law presumes undue influence and the burden is upon the proponent of the will to disprove the presumption.”). I am assuming that the same considerations would apply to a document such as a Power of Attorney.

(d) Ms. Mathews did not sustain her burden of proof to overcome the presumption of undue influence.

(e) Even if the burden of proof had not been shifted from the other parties to Ms. Mathews, I would find that the other parties had met their burden of proof and determine that the December 2002 Will and POA were the result of undue influence. As noted above, “undue influence” is “mental, moral or physical exertion which has destroyed the free agency of a testator by preventing the testator from following the dictates of [her] own mind and will and accepting instead the domination and influence of another.” *Haynes v. First Nat'l State Bank*, 87 N.J. at 176 (Internal citation and quotation marks omitted).

As reflected in the findings of facts, there is compelling credible evidence in the record that Ms. Mathews engaged in a course of conduct, beginning in 2002 and extending into 2005, to (1) isolate her mother from individuals and entities that could provide her with independent advice, including Mr. Smith and her prior financial and legal advisers, and (2) bring about changes in her mother's estate plan to benefit Ms. Mathews and her family to the disadvantage of her brother Mark and any legitimate or adopted issue he might leave. The latter were accomplished through the December 2002 Will and the December 2002 POA, which was used to establish the Texas FLP.

With respect to the December 2002 Will and POA, Ms. Mathews clearly used undue influence to bring about a significant change in her mother's estate plan. At a time when, in addition to the underlying cognitive deficits described by Drs. Lichtenstein and Freedman, Mrs. Glasser had just been released from the hospital and was still suffering the aftereffects of both the surgery

and the post-operative delusions, Ms. Mathews arranged for her to make a new Will and POA through Mr. Purcell, which documents were completed in an expedited manner for no apparent reason.

In addition to the changes in the new Will that benefit Ms. Mathews to the detriment of Mr. Glasser, the October estate plan was changed to make Ms. Mathews the Trustee of her own Trust. The new estate planning documents put Ms. Mathews in primary fiduciary positions by herself, and also included her husband as an alternate fiduciary for the first time.

As part of the December 2002 transactions, Mrs. Glasser's affiliations with Neuberger Berman (an investment firm), Paul Weiss (a law firm) and Hecht and Company (an accounting firm) were terminated and replaced by firms selected by Ms. Mathews - firms that generally took direction through Ms. Mathews rather than directly from Mrs. Glasser.

(5) - Breach of Fiduciary Obligation - Even if I had found that the December 2002 POA was valid and not the product of undue influence, I would hold that Ms. Mathews breached her fiduciary obligations to her mother in its exercise, especially with respect to the Texas FLP. *D'Amato by McPherson v. D'Amato*, 305 N.J. Super. at 115 ("The power of attorney executed by [the principal] imposed a fiduciary duty upon [the agents] to administer [the principal's] assets solely for [her] benefit.") Indeed, it appears that it is the agent who bears the burden of proof in that regard, but my determination would be the same whoever bore the burden of proof. *Ibid*; (*Gallo v. Gallo*, 66 N.J. Super. 1, 5 (App. Div. 1961).

(a) The Mathews were clearly the driving force behind the idea of an FLP after it was proposed by representatives of Goldman Sachs. The Mathews made the arrangements for Mrs. Glasser to meet with Mr. Eastland. Ms. Mathews again brought Mrs. Glasser in contact with Mr. Purcell for the preparation of documents. Mr. Mathews was very involved in the drafting of the NJ FLP, and made at least one suggestion to enhance his wife's role in the plan. Mrs. Glasser was not copied on any of the drafting correspondence.

Perhaps Mr. Purcell's reservations about "sending a letter like [the December 19th letter explaining the overall FLP estate plan] from a perfect stranger, which I was here essentially to Lillian Glasser, without giving her daughter the opportunity to say, yes, my mother should get this, or, no, my mother should not" is the most eloquent expression of Ms. Mathews' role with respect to her mother's interactions with Mr. Purcell on the NJ FLP and the related estate planning. Mr. Purcell was clearly receiving his primary direction about the FLP from the Mathews, and not Mrs. Glaser.

Mrs. Glasser clearly had concerns about the NJ FLP, which is why she asked Mr. Smith for advice. The letter from Mr. Hoffman raised a number of issues, which Mrs. Glasser was prevented from exploring when the Mathews became aware of Mr. Smith's involvement. Mrs. Glasser decided not to pursue the funding of the NJ FLP or the preparation and execution of the remaining estate planning documents.

However, in the Fall of 2004, even as she was getting ready to implement the POA, Ms. Mathews and her husband were again in touch with Mr. Eastland and new counsel for the purpose of creating an FLP in Texas that would give the Mathews very significant control of assets belonging to Mrs. Glasser both before and after her death. That control would inure to the benefit of the Mathews family and to the potential detriment of Mr. Glasser. While Mr. Glasser's share of his mother's estate would go into a Trust to be administered by an independent Trustee, access to those assets would be controlled by the Mathews through the Texas FLP.

Thus, for example, the only income available for distribution to Mr. Glasser through his Trust under the December 2002 Will would be income that Ms. Mathews decided to distribute through the Texas FLP. It would be up to Ms. Mathews discretion whether to invest the assets of the Texas FLP in such a way as to emphasize growth or income - an issue as to which there would be a potential conflict between herself and her brother. And, although Mr. Glasser's corporate Trustee under the December 2002 Will was to have the right to invade principal, it would be possible to do so only with the concurrence of Ms. Mathews through the Texas FLP, because the Trust's interest in the Texas FLP was not a liquid asset. Ms. Mathews would have an inherent

conflict of interest in acting upon a request for disbursement of principal because any principal disbursed to Mr. Glasser would not be available for distribution to her or her children at Mr. Glasser's death.

Ms. Mathews' assertions at trial that she was only trying to protect her mother's assets from creditors and that she would, or might, dissolve the Texas FLP at Mrs. Glasser's death so as to "comply with her wishes" were totally unworthy of belief. In addition to seeking the potential estate tax benefits of the FLP, which is how the FLP concept was presented to Mrs. Glasser in 2003, Ms. Mathews was clearly acting to protect the assets for the benefit of herself and her family and not really from some hypothetical judgment creditor. Her actions in establishing the Texas FLP were not truly for Mrs. Glasser's benefit.

(b) The accounting of the expenditures under the POA that was prepared by Padgett, Stratemann & Co., LLP, reflects a large number of legitimate expenditures for Mrs. Glasser's benefit. There are also a number of gifts for the benefit of others, including members of the Mathews family, that may or may not be consistent with Mrs. Glasser's prior pattern of gift-giving. It appears, for example, that Mrs. Glasser herself was paying some tuitions prior to the implementation of the 2002 POA by Ms. Mathews. There are also expenditures, such as legal fees for the Texas FLP and the defense of this litigation, that were not an appropriate use of Mrs. Glasser's funds, given the Conclusions of Law reached in this Opinion. Although some of those issues were touched upon at trial, there will have to be further proceedings to determine what amounts were legitimate expenditures by Ms. Mathews as at least the de facto attorney-in-fact for her mother and what expenditures must be reimbursed to Mrs. Glasser.

The Texas FLP, however, must be dissolved and all of Mrs. Glasser's assets must be turned over to the guardian of her estate.

(6) - Appointment of a Permanent Guardian of the Person - Pursuant to *N.J.S.A. 3B:12-25*, Ms. Mathews and Mr. Glasser would ordinarily be appointed as their mother's co-guardians. Mr. Glasser is not seeking such an appointment, nor would I under any circumstances appoint him if he were. Ms. Mathews is seeking appointment as guardian, either alone or as co-guardian with another. Mr. Smith is not seeking appointment as guardian. Ms. Kern is seeking appointment as the guardian, arguing that she was designated by Mrs. Glasser in the August 3, 2005 document prepared by Ms. Pen~a as a "surrogate decision-maker" and that she is a "friend" of Mrs. Glasser's, both within the meaning of the statute cited above. It has also been urged that the Public Guardian for Elderly Adults be designated, also pursuant to *N.J.S.A. 3B:12-25*.

(a) The statutory preference for a next-of-kin guardian must be overcome by a judicial finding that the "appointment of next-of-kin would be contrary to the best interests" of the incapacitated person. *In re J.M.*, 292 N.J. Super. 225,240 (Ch. Div. 1996). I have concluded that Ms. Mathews should not be appointed as the guardian of her mother's person for four reasons.

First, I have already found that Ms. Mathews took various actions to exert undue influence over her mother and that she violated her fiduciary obligations as the de facto attorney-in-fact under the December 2002 POA.

Second, there would be a serious conflict of interest because the guardian of the person is charged by statute with pursuing any claims Mrs. Glasser may have against Ms. Mathews, including those arising out of the undue influence and breach of fiduciary duty mentioned above. *N.J.S.A. 3B:12-57*(10). While I could reallocate those responsibilities, I would still be concerned about Ms. Mathews having continuing fiduciary responsibilities at a time when her mother's other guardian might be litigating against her in her mother's name.

Third, there is credible evidence in the record that some of Ms. Mathews' actions in caring for her mother were motivated by her desire to secure further control of her mother's assets and that they had negative effects on Mrs. Glasser's wellbeing. For example, I have determined that she took action to isolate her mother, that she deprived her mother of information about her finances, that she interfered with her mother's ability to live in Boca Raton and Highland Park during the pendency of the Texas proceedings and that she impeded the ability of Ms. Pen~a to consult with and obtain financial information concerning Mrs. Glasser.

There was very convincing testimony that independence, especially control over her assets and residence location, were very important to Mrs. Glasser. Obviously, given Mrs. Glasser's increasing dementia, her independence had to be limited and someone had to start making decisions for her. In my view, Ms. Mathews' approach to her mother's care was insensitive to her mother's feelings in that regard, because it cut off her mother's freedom of action precipitously and without notice or explanation. There was credible medical evidence that this type of conduct would exacerbate Mrs. Glasser's agitation. Ms. Mathews never sat down with her mother, perhaps with one of the physicians present, and explained the situation, offering to work with her mother in making decisions together to the extent possible. Of course, we cannot know the extent to which that approaches would have been successful, if at all. It is significant that this approach was never tried because Ms. Mathews had another agenda.

I am certainly aware that it is not an appropriate judicial function simply to second guess how an adult child handles a parent's unfortunate slid into the oblivion of dementia, unless there is some compelling reason, directly related to the ward's wellbeing, to do so. I find that such compelling reasons are present here because I am convinced that Ms. Mathews' actions were motivated, in significant part, by her desire to secure control of her mother's assets well into the future, rather than simply by a different approach to how best to care for her mother.

In addition, I am particularly troubled by the admission of Mrs. Glasser to the geropsychiatry unit at the Nix Medical Center in April of 2005. I found Ms. Mathews' testimony about the reasons for the admission to be vague and evasive. The "emergent" nature of the admission was not explained satisfactorily, given that the events described by Ms. Mathews had happened days before.

It is clear from the records of Dr. Lichtenstein that Ms. Mathews knew how to contact him when she needed to, yet there was no attempt to do so either at the time of the precipitating events or at the time of the admission. Clearly, however, Ms. Mathews had time to contact her attorney Ms. Whitehead, who was listed as the "referral source" on the Nix intake record.

One consequence of the Nix admission was that Mrs. Glasser was treated by yet another physician, one who was not familiar with her prior history as was Dr. Lichtenstein. There was no explanation of why Dr. Lichtenstein could not have treated Mrs. Glasser at the Nix or, if he did not have privileges there, why she was sent to a hospital at which he had no such privileges.

Fourth and finally, I am convinced that Mrs. Glasser's preference that none of her children or relatives should be appointed as her guardian should be respected. While I do not believe that her preference can be binding because of her mental incapacity, I am satisfied that she has sufficient cognitive ability to express a preference that should be considered in connection with all other factors. Perhaps more importantly, I believe firmly that, given the entire history of this case and its highly charged adversarial nature, Mrs. Glasser's remaining peace of mind would be undercut by having any of the parties appointed as her guardian. There was testimony from the expert witnesses to support that view.

Dr. Freedman testified that someone with dementia needs a low-stress, comfortable environment. Dr. Lichtenstein testified that Mrs. Glasser needs an environment of structure and clam, without visitors who will raise upsetting issues.

(b) I am also convinced that Ms. Kern should not be appointed as guardian of the person. First, I have doubts about whether Ms. Kern is a "friend" of Mrs. Glasser's as that term is used in [N.J.S.A. 3B:12-25](#). She was a former employee of Dr. Glasser with whom Mrs. Glasser maintained a continuing acquaintance. She undoubtedly was very helpful and comforting to Mrs. Glasser, and provided companionship on occasion. She was not, however, the type of close personal friend that I believe the Legislature contemplated in enacting the statute.

Second, the August 2005 document signed by Mrs. Glasser was executed at a time when Judge Spencer had made a preliminary determination of incapacity. I question whether Mrs. Glasser had sufficient cognitive ability at that time to make such a decision and am convinced that it was a decision that was unduly influenced by those around her, albeit people who thought they were helping her. During her trial testimony, Mrs. Glasser did not mention Ms. Kern until she was asked the question about who she would like to have as her guardian a second time, having not mentioned her the first time.

Third, although Mrs. Glasser has to some extent expressed a preference that ought to be considered, I am nevertheless convinced that Ms. Kern is not an appropriate guardian. I do not believe that she was truthful during her trial testimony, especially with respect to the assertion that she told Mrs. Glasser's caregivers that a TRO had been entered. I also believe she has too closely identified herself with the Mark Glasser side of the case, especially because it is Mr. Glasser who has been paying her attorneys fees. I believe that there is a need to have a guardian who is independent of both of Mrs. Glasser's two children.

Most significantly, I do not believe that Ms. Kern has the strength or firmness to undertake the demanding responsibility of being the guardian in this case. The guardian will have to deal decisively with Mrs. Glasser, who can be difficult at times because she is used to independence and because she has serious cognitive deficits which will continue to worsen over time. The guardian must also maintain a balance between the need for Mrs. Glasser to interact with her family members and friends, and the need to protect her from conduct by those same family members and friends which have the potential to increase her level of agitation and stress. I have come to the firm view that, all too often during this litigation, Mrs. Glasser has become the battlefield for the antipathy between her children and their allies - and it should be clear that Mr. Glasser and his "circle of friends" bears much of the responsibility in that regard.

(c) I have seriously considered the appointment of the Public Guardian, who would certainly be neutral as between Mrs. Glasser's two children. I will not appoint the Public Guardian because I believe that Mrs. Glasser will need more personalized attention than would be available from that Office. In addition, there was testimony that Mrs. Glasser would benefit from having a guardian with whom she is already familiar. There was considerable testimony that Mrs. Glasser became upset by constant change in caregivers, largely because she had trouble adjusting to strangers.

(d) Mr. Cornick, who is the current temporary guardian, is unwilling to continue on a permanent basis. I would have appointed him had he been willing to accept the appointment.

(e) Because I believe Mrs. Glasser needs a guardian who can be independent and can deal firmly and decisively with Mrs. Glasser as well as her family and friends, I have determined to appoint Joseph Catanese, Esquire (Mr. Catanese), who has been her court-appointed counsel. Mr. Catanese has the ability, firmness and integrity to act as guardian. He is also familiar with and known to Mrs. Glasser for well over a year. He is familiar with all of the issues involved in Mrs. Glasser's care, and also the issues related to her finances and assets. His loyalty has been to Mrs. Glasser as her court-appointed attorney, and that loyalty can easily be continued and transferred to the role of guardian.

(7) - Appointment of a Permanent Guardian of the Estate - The parties agreed that the Court would appoint an institutional guardian of the estate for Mrs. Glasser. Various suggestions have been made by the parties, including the continuation of Goldman Sachs. That appointment has been opposed, on the basis that Goldman Sachs was allied with Ms. Mathews in the various financial transactions outlined above. Because Goldman Sachs did not participate in the trial and had no opportunity to defend against any such assertions, I make no findings in that regard.

I have determined to appoint Neuberger Berman as the guardian of Mrs. Glasser's estate, assuming it is willing to do so and appropriate financial arrangements can be made. That was the financial firm chosen by Mrs. Glasser, or perhaps Dr. Glasser, to manage her assets prior to the year 2002. Neuberger Berman was also named as the fiduciary in Mrs. Glasser's October 2002 Will, which I have found she had the testamentary capacity to make and which was not the product of any undue influence. I have already determined that the switch from Neuberger Berman to Goldman Sachs was part of the overall exercise of undue influence by Ms. Mathews that led to the execution of the December 2002 Will and POA, which I have invalidated. Consequently, I believe that Neuberger Berman is an appropriate choice.

Counsel fees will be awarded under the principles set forth in *In re Landry*, 381 N.J. Super. 401, 410 (Ch. Div. 2005), unless counsel have more recent case law mandating or suggesting a different approach.

Mr. Catanese should promptly contact Neuberger Berman to ascertain whether it is willing to serve as Guardian of Mrs. Glasser's Estate and to explore the financial arrangements necessary. Mr. Harty should submit a proposed form of order.

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